



S T A T E B A R O F M I C H I G A N

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October 20, 2006

Corbin Davis  
Clerk of the Court  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

306 Townsend Street  
Michael Franck Building  
Lansing, MI  
48933-2083

**RE:** 2005-19 - Proposed Amendment of Rules 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414 of the Michigan Court Rules

Dear Clerk Davis:

At its September 14, 2006 meeting, the Representative Assembly of the State Bar of Michigan considered the above proposed amendment published for comment. The Assembly adopted a number of recommendations on the proposals, which are enclosed for your consideration. I am also including a copy of the relevant portions of the transcript of the Assembly meeting.

We appreciate the opportunity to offer these recommendations for the Court's consideration. Please contact me with any further questions.

Sincerely,

John T. Berry  
Executive Director

cc: Lynn Richardson, Commissioner, Michigan Supreme Court  
Anne Boomer, Administrative Counsel, Michigan Supreme Court  
Kimberly M. Cahill, President  
Janet Welch, General Counsel

Representative Assembly Positions  
Regarding Proposed Changes to MCR 2.513  
September 14, 2006

Cluster 1: Proposals affecting juror materials

- ✓ 2.513 (E) Reference Documents. The court ~~must encourage~~ may, in the court's discretion, allow counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which ~~should~~ may include, but which is not limited to, witness lists, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the ~~preliminary~~ jury instructions and admitted exhibits, ~~and other appropriate information~~ to assist jurors in their deliberations.  
PASSED AS EDITED 59-36

- ✓ 2.513(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions.  
PASSED

- ✓ 2.513(N)(2) Final Instructions to the Jury. Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall may advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during the deliberations. Upon concluding the final instructions, the court shall may invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate. If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations. The sealed envelope shall be made part of the record and preserved for appeal.  
PASSED AS EDITED

- ✓ 2.513(N)(3) Copies of Final Instructions. The court shall may provide each juror with a written copy of the final jury instructions to take into the jury room for deliberation. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.  
PASSED AS EDITED

## Cluster 2: Proposals affecting juror participation

- ✓ 2.513(J) Jury View. On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. ~~During the view, no person, other than an officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion.~~  
PASSED WITH A VERY STRONG YES VOTE, ALTHOUGH NOT UNANIMOUS
- ✓ 2.513(I) Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.  
PASSED 60 YES VOTES TO 40 NO VOTES
- ✓ 2.513 (H) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.  
PASSED UNANIMOUSLY
- ✓ 2.513(K) Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions and argument.  
FAILED UNANIMOUSLY

### Cluster 3: Proposals affecting the role of the judge

- ✓ MCR 2.513(M) Comment on the Evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.  
FAILED UNANIMOUSLY

### Cluster 4: Proposals affecting the role of the attorney

- ✓ MCR 2.513(D) Interim Commentary. Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial.  
FAILED BY A SUBSTANTIAL MARGIN ALTHOUGH NOT UNANIMOUS
- ✓ MCR .513(C) Opening Statements. Unless the parties and the court agree otherwise, the plaintiff or the prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts the plaintiff or the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements.  
PASSED

### Cluster 5: Proposals affecting the submission of evidence

- ✓ MCR 2.513(F) Deposition Summaries: Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read.  
FAILED UNANIMOUSLY
- ✓ MCR 2.513(G) Scheduling Expert Testimony. The court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to: (1) Scheduling the presentation of the parties' expert witnesses sequentially; or (2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination; or (3) providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or the trial judge, would allow the experts to question each other.  
FAILED UNANIMOUSLY

STATE OF MICHIGAN  
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE  
ASSEMBLY of the STATE BAR OF  
MICHIGAN

COPY

Proceedings had by the Representative Assembly of the  
State Bar of Michigan at Ypsilanti Marriott at Eagle Crest,  
Ypsilanti, Michigan, on Thursday, September 14, 2006, at the  
hour of 9:30 a.m.

AT HEADTABLE:

LORI A. BUITEWEG, Chairperson  
EDWARD L. HAROUTUNIAN, Vice-Chairperson  
ROBERT C. GARDELLA, Clerk  
JOHN T. BERRY, Executive Director  
HON. CYNTHIA D. STEPHENS, Parliamentarian  
ANNE SMITH, Staff Member

METROPOLITAN REPORTING, INC.  
(517) 886-4068

1 Ypsilanti, Michigan  
2 Thursday, September 14, 2006  
3 9:33 a.m.

RECORD

CHAIRPERSON BUITEWEG: The September 14, 2006  
meeting of the State Bar of Michigan Representative  
Assembly is hereby called to order.

Mr. Clerk, is there a quorum?

CLERK GARDELLA: Madam Chairperson, yes,  
there is a quorum, and I certify we have the numbers.

CHAIRPERSON BUITEWEG: Thank you, sir.

Is there a motion to adopt the proposed  
calendar?

VOICE: So moved.

VOICE: Support.

CHAIRPERSON BUITEWEG: I heard a motion and  
support on the calendar. Is there any discussion?

All those in favor of adopting the proposed  
calendar, please say yes.

Any opposed?

Any abstentions?

Motion carries. The calendar is adopted.

Is there a motion to approve the April 29th  
minutes?

VOICE: So moved.

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1 VOICE: Support.

2 CHAIRPERSON BUITEWEG: I heard a motion and a

3 second to approve the April 29th minutes. Is there

4 any discussion?

5 All those in favor say yes.

6 Any opposed?

7 Abstentions?

8 Motion carries.

9 I am going to introduce Carl Chioini, the

10 chairperson of our Assembly Nominating and Awards

11 Committee, and I would ask you to please pull the

12 white sheet from the packet at your desk which

13 contains an amended list of nominations, and

14 Mr. Chioini is going to go to the microphone up front

15 here and present the Interim nominations.

16 MR. CHIOINI: If the parties are in the room,

17 would you please stand.

18 From the 1st judicial circuit, Mr. Barry

19 Poulson of Hillsdale. From the 6th judicial circuit

20 we have one vacancy, Martin Krohner of Farmington

21 Hills. From the 6th judicial circuit we have one

22 vacancy till 2008, Joan Vestrand of Rochester.

23 From the 17th judicial circuit, one vacancy,

24 Mr. Nelson Miller from Grand Rapids. From the 28th

25 judicial circuit, one vacancy, Mr. Shane Pranger of

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1 Cadillac. From the 51st judicial circuit, one  
2 vacancy, Jeffrey Nellis of Ludington.  
3 And the last one from the 53rd judicial  
4 circuit, Mr. Daniel Martin of Cheboygan.  
5 CHAIRPERSON BUITEWEG: You have a motion?  
6 MR. CHIOINI: I do move that the members, the  
7 nominees be appointed, seated.  
8 CHAIRPERSON BUITEWEG: Is there a second?  
9 VOICE: Support.  
10 CHAIRPERSON BUITEWEG: Any discussion?  
11 All those in favor of the motion to appoint  
12 these individuals as interim appointees to the State  
13 Bar of Michigan Representative Assembly, please say  
14 aye.  
15 Any opposed?  
16 Any abstentions?  
17 The motion carries, and welcome. Please take  
18 your seats if you haven't already.  
19 (Applause.)  
20 CHAIRPERSON BUITEWEG: And I owe an apology  
21 to these folks right out of the gate. I was supposed  
22 to have a new member meeting out in the front in the  
23 lobby at 9, and I became a little distracted with  
24 other matters this morning. I promise I will give you  
25 an orientation at some point, but, believe me, you

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1 will be oriented by the end of the day.  
2 Those of you who are sitting next to a new  
3 member, please help them along if they have some  
4 questions. I know you will do that.  
5 Again I have Mr. Chioini coming forward to  
6 present consideration of the award recipients for the  
7 awards that we will be giving at the luncheon today,  
8 and those are the Michael Franck and Unsung Hero  
9 Awards.  
10 MR. CHIOINI: Again, thank you. For the  
11 Michael Franck Award, all of you have in your packets  
12 all of the nominations. You can see that this one is  
13 well deserved. The committee selected the Honorable  
14 Judge William Leo Cahalan. The committee would ask  
15 the Assembly to support the motion.  
16 CHAIRPERSON BUITEWEG: Support?  
17 VOICE: Support.  
18 CHAIRPERSON BUITEWEG: Is there any  
19 discussion?  
20 All those in favor of awarding the Michael  
21 Franck Award to the Honorable William Leo Cahalan,  
22 please say yes.  
23 Any opposed?  
24 Any abstentions?  
25 Motion carries.

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1 Mr. Chioini.  
2 MR. CHIOINI: The next one is the Unsung Hero  
3 Award, and the committee has nominated Mr. Jay D.  
4 Kaplan, who is the Legal Project Staff Attorney for  
5 the ACLU. Again, I would move the committee's  
6 recommendation be approved.  
7 VOICE: Support.  
8 CHAIRPERSON BUITEWEG: Is there a second?  
9 Thank you.  
10 I have heard a motion and a second to award  
11 the Unsung Hero Award to Jay D. Kaplan. Is there any  
12 discussion?  
13 All those in favor say yes.  
14 Any opposed?  
15 Abstentions?  
16 Motion carries. Congratulations to the award  
17 recipients, and we will talk more about them at the  
18 luncheon today.  
19 Mr. Chioini, don't go away yet. We have you  
20 on the calendar for consideration of an amendment to  
21 the Permanent Rules of Procedure regarding Awards,  
22 8.8, and that is the tab four of your packet.  
23 MR. CHIOINI: The committee has suggested to  
24 the body that we avoid a little bit of a problem that  
25 we have logistically, and that is having the

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1 nominations done in the morning and having the lunch  
2 in the afternoon, and the proposal from the committee  
3 would require the Assembly to vote on the awards at  
4 the April meeting. This would be the official, when  
5 they would receive their awards, and the idea being to  
6 avoid all of the difficulties we have when we have the  
7 morning nominations and a luncheon this afternoon.  
8 I would ask that the Assembly adopt the  
9 recommendation of the Rules Committee, Nominating  
10 Committee.  
11 CHAIRPERSON BUITEWEG: Is there a support?  
12 VOICE: Support.  
13 CHAIRPERSON BUITEWEG: There is a motion and  
14 a second to support the proposal that the April  
15 meeting of the Assembly be established as a deadline  
16 for the Nominations and Awards Committee to meet and  
17 recommend to the Assembly qualified members of the  
18 State Bar as recipients of the Michael Franck and  
19 Unsung Hero Awards. Is there any discussion?  
20 All those in favor of the motion, please say  
21 yes.  
22 Any opposed?  
23 Abstentions?  
24 Motion carries. Thank you, Mr. Chioini.  
25 We turn now to our item which I am sure is of

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1 great interest to all of those in the room, the jury  
2 reform proposals, which you will find at tab number  
3 five of your packet. I am going to ask you to look at  
4 your yellow and blue sheets that are at your desk.  
5 Those are the Exhibits A and B that are referenced in  
6 the packets, and specifically that is the press  
7 release that was issued by the Supreme Court and the  
8 actual Court Rule amendment. Those were also sent to  
9 you by electronic mail, and we also have them  
10 available to put up on the screen.  
11 The first thing that we need to do with  
12 respect to this portion of the agenda is I need to  
13 have Tom Rombach from Special Issues come forward and  
14 propose some special rules for how we are going to  
15 handle this matter. Mr. Rombach.  
16 MR. ROMBACH: Madam Chair, Tom Rombach from  
17 the 16th circuit. At this time I would like to  
18 propose adoption of special rule of procedure in order  
19 for us to suspend certain and amend certain parts of  
20 Robert's Rules of Procedure.  
21 VOICE: We cannot hear back here.  
22 MR. ROMBACH: Madam Chair, I am Tom Rombach  
23 from the 16th circuit. At this time I would like to  
24 move that we adopt the proposed rules for the Assembly  
25 debate regarding the jury reform proposals. This is a

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1 special rule that will suspend certain of Robert's  
2 Rules and also would amend certain of Robert's Rules,  
3 for this discussion only.  
4 CHAIRPERSON BUITEWEG: Before I ask for a  
5 second, I am going to allow the Assembly a moment to  
6 view this up on the screen. Nancy, if you could get  
7 the whole thing up there, because you do not have this  
8 in front of you. You were sent a draft of it by  
9 electronic mail, and the panel met yesterday evening  
10 and made some minor revisions to it. So I do  
11 apologize, this is the first time you are seeing this.  
12 I will walk you through it briefly. Can you make it  
13 the whole screen?  
14 MS. BROWN: I can't.  
15 CHAIRPERSON BUITEWEG: This is going to grant  
16 floor privileges to all of the panelists that you see  
17 in front of you who I will introduce momentarily, as  
18 well as Justice Markman, who is here and will  
19 introduce the rules to us. We will also appoint our  
20 own Assembly member, Wallace Kent, Jr., judge from  
21 Tuscola County, to serve as moderator of the panel.  
22 It will also allow us to have the panel discuss the  
23 proposals in clusters, clusters first affecting juror  
24 materials, proposals that affect juror participation,  
25 that affect the role of the judge, the role of the

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1 attorney, that affect the submission of evidence.  
2 What will happen under this special rule is  
3 that the clusters will be discussed by the panel in a  
4 group. They have each chosen rules that they would  
5 like to address. We will then open it up to the floor  
6 for discussion and debate and questions proposal by  
7 proposal. We will take a vote one proposal at a time  
8 and then move on to the next cluster, and that is  
9 basically what this special rule says.  
10 So that is the motion to adopt this rule, and  
11 is there a second?  
12 VOICE: So moved.  
13 CHAIRPERSON BUITEWEG: Is there any  
14 discussion? All right.  
15 All those in favor of adopting the special  
16 rule, say yes.  
17 Any opposed?  
18 Any abstentions?  
19 Motion carries. The rules are adopted.  
20 Thank you.  
21 I would next like to introduce our esteemed  
22 guest, the Honorable Justice Stephen J. Markman, who  
23 is going to introduce the proposed jury reforms to us.  
24 Justice Markman was appointed to the Michigan  
25 Supreme Court by Governor John Engler effective

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1 October 1, 1999 to fill the seat vacated by Justice  
2 James H. Brickley. In 2000 he was elected to complete  
3 the term which expired January 1, 2005. In 2004 he  
4 was reelected to an eight-year term which expires  
5 January 1, 2013.  
6 Prior to this Justice Markman served for four  
7 years as an assistant attorney general of the United  
8 States after being nominated by President Ronald  
9 Reagan and confirmed by the United States Senate.  
10 Would you please join me in welcoming Justice  
11 Markman at this point in time.  
12 (Applause.)  
13 JUSTICE MARKMAN: Thank you very much, Lori.  
14 This is a very daunting audience here, and I expect I  
15 will see the same kind of unanimity on this issue that  
16 we did on the last issue on the agenda.  
17 It is an honor to be here this morning to  
18 introduce the deliberations of the Representative  
19 Assembly on the matter of jury reform, and I know I  
20 speak for all of my colleagues when I say that we are  
21 very much looking forward to your thoughts and your  
22 feedback on this issue.  
23 As you know, the Supreme Court several months  
24 ago issued proposed reforms for public comment. In  
25 addition to the kind of forum for discussion that we

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<p>1 are witnessing today, the Court hopes to receive 2 comments, not only from members of the Bench and Bar 3 and from key organizations, such as this of course, 4 but also from individuals who themselves have 5 participated in jury service.</p> <p>6 Our comment period will culminate, I expect, 7 sometime early next year with an administrative 8 hearing before the full court at which any person or 9 organization will be invited to share their comments, 10 and I really do urge your individual participation, as 11 well as your participation through the Representative 12 Assembly and the Bar.</p> <p>13 Each one of you is welcome to participate and 14 share your particular thoughts on any aspect of jury 15 reform, and we have this public comment system now. 16 We have three or four administrative hearings a year 17 which we open them up to the public, and we found this 18 to be a very valuable process for eliciting comments 19 from the public, and they have been extremely helpful. 20 Again, we invite you to participate.</p> <p>21 I am not here this morning to urge your 22 approval of any or all of these reforms but only your 23 thoughtful consideration. I suspect that there is no 24 member of my court, including myself, who favors each 25 of these specific reforms. They are proposals that</p>	<p>1 the better lawyer.</p> <p>2 There may be other proposals designed to 3 further these same purposes that may be worthy of 4 consideration, and I invite you to share your thoughts 5 in this regard. We do not purport that the proposals 6 that we have issued for public comment are exclusive. 7 Are there additional reform proposals that would 8 empower the jury in a manner consistent with the 9 architecture and constitutional premises of our 10 overall legal system to better carry out its 11 responsibility of distinguishing between truth and 12 falsity?</p> <p>13 While there is no particular brief that I or 14 any of my colleagues have for any particular reform, 15 there is nonetheless tentatively strong support, I 16 believe, for the idea that these reforms should be 17 seriously explored.</p> <p>18 Undenably the burden of persuasion in this 19 realm must be upon the proponents of change, not that 20 the system cannot be strengthened but simply that 21 there is at least as much potential for the system to 22 be weakened. As John Randolph once remarked in the 23 Continental Congress, change is not reform.</p> <p>24 The present rules of the game have worked 25 well in enabling the jury to carry out its missions,</p>
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<p>1 have been collected together from various sources, and 2 they were thought sufficiently meritorious or 3 provocative to warrant dissemination for public 4 review.</p> <p>5 Therefore, there is much that these reforms 6 do not have in common. Some are couched in terms of 7 what trial courts may do and others in terms of what 8 trial courts shall do. Some represent current 9 practice in Michigan and are merely consolidated here, 10 while others represent new initiatives. Some are 11 drawn from other jurisdictions and some are not.</p> <p>12 However, what these proposals do have in 13 common is that each is designed, at least intended, to 14 enhance the quality of the jury's deliberative process 15 and thereby further the truth seeking function of the 16 jury trial. Each is designed to strengthen the 17 ability of the jury to undertake to make informed and 18 intelligent decisions by making evidence more 19 accessible.</p> <p>20 Each is designed to diminish opportunities 21 for gamesmanship in the trial process and to 22 facilitate the ability of the jury to assess the 23 evidence before it, and each is designed to render 24 somewhat less true Robert Frost's famous adage that a 25 jury consists of 12 persons chosen to decide who has</p>	<p>1 and those rules should not be altered lightly or 2 without struggling to anticipate the unanticipated 3 consequences of change.</p> <p>4 At the same time there is considerable 5 evidence drawn from the experiences of other states 6 that at least some of these proposals have succeeded 7 in further strengthening the jury's ability to 8 apprehend what has taken place in the courtroom and to 9 rely upon such evidence in reaching accurate and 10 responsible factual determinations.</p> <p>11 My court seeks your collective and individual 12 response, and we will take your comments very, very 13 seriously, as I believe we always do with respect to 14 the Representative Assembly. We appreciate the 15 expertise here, and it is unfathomable to me that your 16 comments on this matter or on any other matter would 17 not be given the most serious consideration by my 18 court.</p> <p>19 In 1875 the Lieutenant Governor of our state, 20 Charles May, addressed the then new University of 21 Michigan Law School and stated at the time, The jury 22 system is the handmate of freedom. No civil liberty 23 can dispense with any of her armaments. I believe 24 that a jury is always the best and fittest tribunal to 25 find the facts of a case. The facts to be found in a</p>



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<p>1 trial in the courts are generally the facts of common 2 life. The deductions and conclusions to be drawn from 3 these facts in nine cases out of ten are the 4 deductions and conclusions of ordinary human 5 experience. They do not so much require learning and 6 logic as practical, common sense, knowledge of human 7 nature as seen in men and not in books, and intuitive 8 perceptions of right and wrong. Qualities often are 9 found combined, I think, in the jury box than upon the 10 bench.</p> <p>11 Among other matters, I would urge you to 12 reflect on Lieutenant Governor May's observations and 13 share with us your thoughts as to whether the factual 14 determinations of the trial continue mostly to concern 15 the facts of common life. And whatever your answer, I 16 would urge you to reflect upon whether current 17 procedures and practices and rules in our state can be 18 improved to allow the jury to better carry out its 19 extraordinarily important responsibilities in self 20 government in ascertaining both common and uncommon 21 facts.</p> <p>22 And we would ask you, of course, as I know is 23 implicit in all of your considerations, is to consider 24 this not merely from the perspective of the Bar, not 25 merely from the perspective of the Bench and Bar, but</p>	<p>1 Next we have the Honorable William Caprathé. 2 He has been a circuit court judge since 1981 and was a 3 trial attorney for 15 years before that. He served as 4 chief judge from 1984 to 1997. He is from Bay City. 5 In 2004 and 2005 he served on the American Bar 6 Association's American Jury Project that paved the way 7 for the ABA Board of Governors' passing of the 8 principles for jury and jury trials.</p> <p>9 He is presently a member of the ABA's 10 Commission on the American Jury Project that is 11 assigned the task of disseminating information about 12 the principle throughout the country.</p> <p>13 Next we have James Dimos. Jim is a partner 14 of Locke Reynolds and chair of the firm's intellectual 15 property group. He also serves as a member of the 16 firm's management committee. He is also an attorney 17 from Indiana who has personal experience in the 18 courtroom trying cases using some of these jury 19 reforms.</p> <p>20 Mr. Dimos represents businesses in all areas 21 of law and is also very active in professional 22 organizations, such as Indiana State Delegate to the 23 American Bar Association House of Delegates. 24 Mr. Dimos is also a member of the Indiana State Bar 25 Association and served on its Board of Governors from</p>
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<p>1 also from the perspective of the larger public 2 interest.</p> <p>3 Thank you again for the efforts of the 4 Michigan Bar and particularly its Representative 5 Assembly to assist my court in the development of our 6 state's law. Thank you very much.</p> <p>7 (Applause.)</p> <p>8 CHAIRPERSON BUITEWEG: Thank you very much, 9 Justice Markman.</p> <p>10 All right. I am going to at this time 11 introduce our panelists. We have with us today in 12 alphabetical order, and if you could raise your hand 13 as I call your name, James Bell. James Bell is a 14 member of the white collar practice group at the 15 Indianapolis law firm of Bingham McHale. He practices 16 in the area of the criminal defense at both the trial 17 and appellate levels and defends attorneys in 18 disciplinary matters. James is a frequent speaker on 19 the issues of ethics, trial practice, and criminal 20 defense. He received his undergraduate degree from 21 DePauw University in 1996 and graduated from Indiana 22 University School of Law at Indianapolis in 1999.</p> <p>23 He brings with him today his personal 24 courtroom experience in using some of the jury reforms 25 that we are considering today in Indiana.</p>	<p>1 2002 to 2004. He received his B.A. from Wabash 2 College in 1983 and his J.D. from Washington 3 University School of Law in early '86.</p> <p>4 Next we have the Honorable Giovan the 5 Infinite judge of the Wayne County Circuit Courts 6 since January 1976. Judge Giovan has written 7 extensively of the Bench and Bar on matters of 8 evidence and civil procedure. Judge Giovan is the 9 chair of the Michigan Supreme Court Advisory Committee 10 on the Rules of Evidence and was a member of the 11 original committee appointed by the court in 1975 to 12 recommend proposed rules of evidence for the state of 13 Michigan.</p> <p>14 He is also chair of the Supreme Court 15 committee on Model Civil Jury Instructions. Judge 16 Giovan is one of the authors of the two volume 17 treatise in West Michigan called Civil Procedure 18 Before Trial.</p> <p>19 Next we have the Honorable Daniel G. Heath. 20 He is a ten-year veteran of the Allen Superior Court 21 Civil Division located in Fort Wayne, Allen County, 22 Indiana.</p> <p>23 Prior to becoming a judge he practiced law in 24 Fort Wayne concentrating on civil and family law. He 25 brings with him many years of experience presiding</p>

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<p>1 over cases involving many of the jury reforms we are 2 examining today.</p> <p>3 Next we have the Honorable Wallace Kent, Jr., 4 our own Representative Assembly member who is the 5 moderator. He obtained his B.A. from Kalamazoo 6 College in 1965 and his J.D. from University of 7 Michigan Law School in 1967. He has been the Tuscola 8 County Probate Judge since 1977 and is the past 9 president of the Tuscola County Bar Association. He 10 is also a member of the Assembly.</p> <p>11 Next we have Terrence Miglio. Terrence is 12 the president of the Michigan Defense Trial Council. 13 He is also a member and vice president of the law firm 14 Keller Thomas in Detroit, Michigan. His practice is 15 devoted to representing and advising clients in such 16 areas as employment law, labor relations, civil 17 rights, personal injury defense, school law and 18 municipal liability. Mr. Miglio graduated from 19 University of Michigan undergraduate and has his J.D. 20 from Wayne State University School of Law, cum laude.</p> <p>21 Next Doug Shapiro, who is a partner at Muth &amp; 22 Shapiro in Ypsilanti, right here. He focuses on 23 serious personal injury and medical malpractice cases 24 and has practiced as a trial lawyer for 15 years. 25 Prior to his work in trial practice Doug spent three</p>	<p>1 am chair of the Special Issues Committee and also 2 serving on behalf of the 16th circuit, Macomb County.</p> <p>3 As chair of the Special Issues Committee, I 4 am not a proponent of these jury reform proposals in a 5 traditional sense. The Special Issues Committee met 6 and discussed these. We are not making a 7 recommendation on any of them. So, therefore, my role 8 today is more of a presenter. I do, however, reserve 9 the right to express my own personal opinion in an 10 appropriate manner, at least as an appropriate manner 11 as I can muster.</p> <p>12 With that proviso, I will move to the first 13 cluster that Lori referred to. That's proposals 14 affecting jury materials under A. Just for your 15 reference, in your materials that were sent to your 16 respective offices, the trial notebook proposal, the 17 first one we will be considering is actually on page 18 seven of your materials under the tab referencing the 19 jury reform proposals. So page seven is the first 20 under consideration.</p> <p>21 The next jury instructions is going to be 22 listed on page ten of your materials. And the final 23 one in this cluster, the proposal regarding final 24 instructions, is actually on page 11. So if you want 25 to sing along with the experts, you may do so in the</p>
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<p>1 years as the law clerk to Michigan Supreme Court 2 Justice James Brickley and an additional two years in 3 full-time appellate practice. Doug graduated with a 4 B.A. with high distinction from the University of 5 Michigan and also received his J.D. cum laude from 6 University of Michigan. He is a past Representative 7 Assembly member from the 22nd circuit.</p> <p>8 Have I got everybody? Okay. All right.</p> <p>9 What we are going to do now is we are going 10 to have Mr. Rombach come forward, and he is going to 11 introduce the first cluster of proposals to us.</p> <p>12 Well, before we do that, if we could have 13 Nancy please put up on the screen the visual. What we 14 have done for you with this is to break down for you 15 the proposals that emanated or were propounded by the 16 ABA jury reforms and those that have been similarly or 17 wholly enacted in Indiana. This is just to give you a 18 point of reference as to which reforms are coming to 19 us from the ABA and which ones are being used in 20 Indiana. That's just really for your reference.</p> <p>21 Tom, if I could have you introduce the first 22 cluster, and we will have Judge Kent moderate the 23 panel on that, then open up each individual proposals 24 to the Assembly for questions and debate.</p> <p>25 MR. ROMBACH: Good morning. Tom Rombach. I</p>	<p>1 appropriate pages.</p> <p>2 At this point, I will now defer our 3 discussion to the chair of our panel and our fellow 4 Representative Assembly member, Judge Kent.</p> <p>5 JUDGE KENT: Thank you. By way of 6 introduction, first of all, I wanted to thank 7 Justice Markman for his comments and assure you that 8 in my experience the Supreme Court really does want 9 your comments, not only today, but in the future until 10 this matter is resolved.</p> <p>11 Secondly, I want to thank Lori for all the 12 work she has put into structuring this. This is 13 almost a Herculean task to debate these matters in the 14 time allotted, and Lori and others have worked 15 diligently in order to get this organized.</p> <p>16 Many of the proposals will have generated 17 some very strong opinions, many of them we may find 18 that there is general consensus. Because of the time 19 allotted, I am going to ask that to the extent 20 possible you spend the bulk of your time in comment on 21 those matters concerning which there may not be any 22 basic consensus in order that we may spend more time 23 listening to the comments of all persons who have 24 views on the matters concerning which there is not 25 consensus.</p>

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<p>1 With that having been said, regarding this</p> <p>2 first cluster, I would ask if either of the gentlemen</p> <p>3 from Indiana wish to speak about the experience that</p> <p>4 they have had with any of these three issues, because</p> <p>5 Indiana has already implemented some of these</p> <p>6 proposals in their Court Rules, and they can speak</p> <p>7 from actual experience.</p> <p>8 Excuse me. I have been reminded before we do</p> <p>9 that Judge Caprathe is going to briefly discuss the</p> <p>10 genesis of this whole litany of proposals as generated</p> <p>11 by ABA.</p> <p>12 JUDGE CAPRATHE: Many of the proposals that</p> <p>13 are here have come from the principles that were</p> <p>14 referred to earlier that the ABA passed in 2005 at the</p> <p>15 annual meeting, the Board of Governors passed. Can</p> <p>16 you hear me back there? And many of them haven't come</p> <p>17 from those principles. Some of the principles would</p> <p>18 support in concept rather than directly.</p> <p>19 The one that we start with has a criticism</p> <p>20 from myself and many of the judges from the Michigan</p> <p>21 Judges Association, and that is that it uses the term</p> <p>22 "must encourage," which is rather confusing. In a</p> <p>23 sense it's sort of contradictory. But we would</p> <p>24 support that rule for notebooks if it were to say</p> <p>25 "may," because, depending upon the complexity of the</p>	<p>1 generally what happens, we meet at a final status</p> <p>2 conference and go over many things, but among them</p> <p>3 will be the things in the jury trial notebook. Those</p> <p>4 usually include those matters to which the attorneys</p> <p>5 have stipulated the authenticity of the exhibits.</p> <p>6 Those materials that have not been stipulated to are</p> <p>7 kept out of the trial notebook, at least in my court,</p> <p>8 and they are treated like any other exhibit and</p> <p>9 considered for admission at the time pertinent during</p> <p>10 trial.</p> <p>11 So the trial notebook contains stipulated</p> <p>12 material. Record is made outside the presence of the</p> <p>13 jury before the trial begins about those matters of</p> <p>14 which they wish to preserve objection. For example, I</p> <p>15 think I mentioned some comments I gave to the</p> <p>16 committee before I got here. Medical costs or medical</p> <p>17 records may be in the trial notebook, but counsel</p> <p>18 often makes a record that just because there is an</p> <p>19 exhibit that has the total costs involved for medical</p> <p>20 care in no way is an admission or stipulation as to</p> <p>21 causation or as to the right of the attorney to</p> <p>22 further controvert the total cost of the medical care</p> <p>23 and so on.</p> <p>24 So that's normally what happens, and in the</p> <p>25 practice itself when the jury is there and they have</p>
Page 26	Page 28
<p>1 case, the length of the case, the issues involved, the</p> <p>2 attorneys, there are a lot of considerations before</p> <p>3 you would want to take that big step of using a</p> <p>4 notebook in a particular case, and, therefore, we</p> <p>5 would support it if it were to be changed in that</p> <p>6 respect.</p> <p>7 And that cuts through many of these</p> <p>8 suggestions, that if the word "may" would replace</p> <p>9 "must" or "shall" or "should," we would prefer it, and</p> <p>10 then we would be able to make a group decision with</p> <p>11 the attorneys and the judge as to how to proceed, with</p> <p>12 the judge making the ultimate decision.</p> <p>13 JUDGE KENT: Thank you, Judge Caprathe.</p> <p>14 Judge Heath, would you like to comment at all?</p> <p>15 JUDGE HEATH: Yes, thank you very much. We</p> <p>16 have, in fact, the words "may authorize" in our Jury</p> <p>17 Rule Number 23 in Indiana regarding trial notebooks.</p> <p>18 It says, in both criminal and civil cases the court</p> <p>19 may authorize the use of juror trial books, and I</p> <p>20 won't read the rest of the rule, but those are the</p> <p>21 pertinent words we use.</p> <p>22 I have been using trial notebooks for many</p> <p>23 years, well before this jury rule was adopted.</p> <p>24 Generally what happens, and you are probably doing</p> <p>25 some of that as well already without this rule,</p>	<p>1 the notebooks presented to them, the attorneys make a</p> <p>2 record at that time that they stipulate to the</p> <p>3 authenticity of those exhibits before they are</p> <p>4 actually handed to the jury, and then they are given</p> <p>5 to the jury, and, frankly, it's neater, it's cleaner,</p> <p>6 it's more efficient. The attorneys themselves often</p> <p>7 direct during examination a certain exhibit in the</p> <p>8 trial notebook, so they can turn to it quickly.</p> <p>9 The old system when I first started on the</p> <p>10 bench was that the exhibits would be disseminated to</p> <p>11 the jury as they occurred during trial, and that was a</p> <p>12 slow, laborious process. Now they are in a notebook</p> <p>13 ready to go.</p> <p>14 The court has one, the attorneys each have</p> <p>15 one, each of the jurors have one and then -- now,</p> <p>16 sometimes during the trial the exhibits are not</p> <p>17 discussed at all. It just happens that way, and at</p> <p>18 times perhaps before it's over something might be</p> <p>19 removed, and that's true. But generally during the</p> <p>20 trial the trial notebook is noncontroversial. It's</p> <p>21 something that's been decided weeks beforehand, and</p> <p>22 also motions in limine can take care of some of the</p> <p>23 concerns about trial notebooks. So my experience has</p> <p>24 been very beneficial to the use of trial notebooks.</p> <p>25 JUDGE KENT: Also included in this cluster is</p>

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<p>1 the proposal about providing the jury with written</p> <p>2 copies of the preliminary and the final instructions.</p> <p>3 Do any panelists wish to comment on that?</p> <p>4 JUDGE HEATH: Just a quick comment. We give</p> <p>5 our jurors both the preliminary instructions and the</p> <p>6 final instructions. Each juror gets one. We read it</p> <p>7 to them. We don't stop reading instructions just</p> <p>8 because they have a copy. We read it to them, and we</p> <p>9 find them going through the instructions with us one</p> <p>10 by one reading along with them, and then they have the</p> <p>11 instructions with them, and we have found that to be</p> <p>12 extremely beneficial, and, frankly, now that we have</p> <p>13 been doing that for a few years I can't imagine doing</p> <p>14 it the other way, because some these instructions --</p> <p>15 it makes the instructions more usable by the jury. It</p> <p>16 doesn't require them to rely completely on their</p> <p>17 memory, which could be foggy about the language of</p> <p>18 some instruction, and so I find it very beneficial.</p> <p>19 JUDGE KENT: Mr. Dimos, I believe you also</p> <p>20 had some comments on this cluster.</p> <p>21 MR. DIMOS: I did. Thank you, Your Honor.</p> <p>22 On the notebooks, one concern that I saw</p> <p>23 expressed in the materials and is a legitimate concern</p> <p>24 is human nature in that when someone has something in</p> <p>25 their hands they are going to page through it during a</p>	<p>1 class, what do you think our jurors are going to be</p> <p>2 looking for from us in the courtroom?</p> <p>3 JUDGE KENT: Thank you. According to our</p> <p>4 plan here, Mr. Rombach would be moving the three</p> <p>5 proposals.</p> <p>6 Any other comments -- I am sorry. Yes, sir.</p> <p>7 MR. SHAPIRO: Very briefly. Terry and I were</p> <p>8 whispering to each other that one thing that should be</p> <p>9 brought to the Assembly's attention which differs from</p> <p>10 the Indiana proposal and I think merits its own</p> <p>11 consideration under this one is that the trial</p> <p>12 notebook under the proposed Michigan rule would</p> <p>13 provide not only for admitted exhibits, but it says,</p> <p>14 And other appropriate information to assist jurors in</p> <p>15 their deliberations. What such other materials may be</p> <p>16 other than materials that have been properly entered</p> <p>17 into evidence is hard to imagine, and I think that</p> <p>18 that portion of the rule is questionable in terms of</p> <p>19 how it would be administered and whether or not it</p> <p>20 would require modification to the Rules of Evidence.</p> <p>21 MR. BELL: It's been our practice in Indiana</p> <p>22 to only put the exhibits in. Judge, is that your</p> <p>23 practice as well?</p> <p>24 JUDGE HEATH: That's right.</p> <p>25 MR. BELL: Our rule does provide you can put</p>
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<p>1 full time, and when you are dealing with materials</p> <p>2 that perhaps might be considered inflammatory,</p> <p>3 pictures in a personal injury situation, we have sort</p> <p>4 of done a modified approach as described by</p> <p>5 Judge Heath, and that is pass certain exhibits out at</p> <p>6 a time or pass all the exhibits out still but have</p> <p>7 them stored in the notebook. It doesn't save the</p> <p>8 time, but it allows you to avoid the situation of, if</p> <p>9 you will, the jury reading ahead. That's something</p> <p>10 though that the parties generally work towards an</p> <p>11 agreement and seems to work out fine.</p> <p>12 On the jury instructions, I think the</p> <p>13 notebooks -- this whole cluster addresses a bigger</p> <p>14 point that people who try cases need to be well aware</p> <p>15 of, and that is you have to be cognizant of how people</p> <p>16 learn. We are in the education business as much as</p> <p>17 the advocacy business, and human nature is such today</p> <p>18 that they need to see things more than once. They</p> <p>19 need to read along while listening, and so while these</p> <p>20 may be different than the practice you are used to, I</p> <p>21 would ask that you consider them and the notion of how</p> <p>22 do people learn today.</p> <p>23 A small aside, I have a nine-year-old son who</p> <p>24 was working on a Power Point the other night for</p> <p>25 class. If nine-year-olds are using Power Points in</p>	<p>1 witness lists and some other items in there, but I</p> <p>2 have never seen statutes or witness lists or anything</p> <p>3 other than agreed upon exhibits in those notebooks.</p> <p>4 JUDGE KENT: Any other comments?</p> <p>5 JUDGE GIOVAN: I have a comment. Strangely</p> <p>6 enough, of all the new provisions, the one that I am</p> <p>7 personally afraid of the most is being required in 100</p> <p>8 percent of the cases to prepare written instructions</p> <p>9 to the jury. I am in a busy urban trial court. We</p> <p>10 try sometimes, you know, cases one right after</p> <p>11 another. Sometimes people are on standby, and the</p> <p>12 cases differ vastly in their complexity.</p> <p>13 In many cases the jury instructions are</p> <p>14 practically irrelevant, and a good example is the case</p> <p>15 that I just finished yesterday where the sole issue in</p> <p>16 the case was did the plaintiff burn his own house</p> <p>17 down? That was the question that we put to them. It</p> <p>18 was a claim under insurance policy. There were no</p> <p>19 issues about the policy or the extent of damages. Did</p> <p>20 the plaintiff set the fire or not?</p> <p>21 For us to sit down and do all the</p> <p>22 instructions I think would have been a waste of time.</p> <p>23 We have the ability under the present rules to do</p> <p>24 either a complete or a partial set of jury</p> <p>25 instructions, and I object to being required to do it</p>

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<p>1 In 100 of the cases regardless of the complexity or</p> <p>2 simplicity.</p> <p>3 CHAIRPERSON BUITEWEG: Tom, I am going to</p> <p>4 have you come up and introduce 2.513(E) to the</p> <p>5 Assembly and then invite the Assembly members to come</p> <p>6 forward as they wish and comment or ask questions.</p> <p>7 MR. ROMBACH: Thank you, Lori. At this time,</p> <p>8 for purposes of facilitating the Assembly discussion</p> <p>9 and debate, I am moving for adoption of the trial</p> <p>10 notebook provision. That's located on page seven</p> <p>11 under the appropriate tab, and that issue is should</p> <p>12 the courts be required to encourage attorneys in civil</p> <p>13 and criminal cases to provide jurors with a reference</p> <p>14 document or notebook, the contents of which should</p> <p>15 include, but not limited to, witness lists, relevant</p> <p>16 statutory provisions, and copies of the relevant</p> <p>17 documents if the witness lists, relevant statutory</p> <p>18 provisions, admitted exhibits, and in cases where the</p> <p>19 interpretation of a document is at issue, copies of</p> <p>20 the relevant document? At this time I move for that</p> <p>21 adoption. I need a second.</p> <p>22 VOICE: Second.</p> <p>23 CHAIRPERSON BUITEWEG: Thank you. All right.</p> <p>24 It has been moved and seconded that we adopt the</p> <p>25 revisions to 2.513(E) regarding reference documents.</p>	<p>1 substitute the words "may, in the court's discretion,</p> <p>2 allow," so it reads, "The court may, in the court's</p> <p>3 discretion, allow counsel," et cetera.</p> <p>4 CHAIRPERSON BUITEWEG: That's a proposed from</p> <p>5 the amendment. Does the proponent accept the friendly</p> <p>6 amendment?</p> <p>7 MR. ROMBACH: Yes, I will accept that.</p> <p>8 CHAIRPERSON BUITEWEG: Is there a second on</p> <p>9 this proposed amendment?</p> <p>10 VOICE: Support.</p> <p>11 CHAIRPERSON BUITEWEG: Is there discussion on</p> <p>12 the proposal as amended?</p> <p>13 MR. ANDREE: I just have a question. Are we</p> <p>14 allowed to put it to the panel members?</p> <p>15 CHAIRPERSON BUITEWEG: Yes.</p> <p>16 MR. ANDREE: I am asking this question based</p> <p>17 on questions proposed by the judges of the 6th</p> <p>18 circuit. Among those, they wanted to know is there</p> <p>19 one notebook that is jointly used, or does each side</p> <p>20 give a notebook?</p> <p>21 MR. BELL: The trials I have been a part of,</p> <p>22 each juror has had his own or her own notebook.</p> <p>23 MR. ANDREE: No, no, does each side give</p> <p>24 their own notebook? Does each juror end up with two</p> <p>25 notebooks?</p>
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<p>1 If we could get that actual Court Rule up there,</p> <p>2 2.513(E), with the proposed revisions to it. That's</p> <p>3 at your desk in the green, I believe -- no, not green.</p> <p>4 Yellow. If you look at the yellow, the yellow</p> <p>5 document, and flip to 2.513(E), all right, which is on</p> <p>6 page five, middle of the page. Does everybody see</p> <p>7 that? That's the actual Court Rule that coordinates</p> <p>8 with this proposal.</p> <p>9 So we have a motion and a second. Is there</p> <p>10 discussion? Now is not the time to be shy. Come on</p> <p>11 down to the microphone.</p> <p>12 I am sorry for the logistics. If you know</p> <p>13 you are going to want to talk about any of the three</p> <p>14 proposals in this cluster, you might want to line up</p> <p>15 at the microphone now, since it does take a little</p> <p>16 while to get through the seating. And please state</p> <p>17 your name and circuit for the record.</p> <p>18 MR. ANDREE: Gerard Andree from the 6th</p> <p>19 circuit. I have a point of order question. Are we</p> <p>20 limited to the wording as indicated here, or may we</p> <p>21 propose an amendment?</p> <p>22 CHAIRPERSON BUITEWEG: You may propose an</p> <p>23 amendment.</p> <p>24 MR. ANDREE: First of all, I would propose</p> <p>25 that we take out the words "must encourage" and</p>	<p>1 CHAIRPERSON BUITEWEG: One notebook.</p> <p>2 MR. DIMOS: Though it can be in multiple</p> <p>3 volumes, given the size of the case.</p> <p>4 MR. ANDREE: That is the only question I</p> <p>5 have.</p> <p>6 CHAIRPERSON BUITEWEG: Is there further</p> <p>7 discussion on this proposal as amended?</p> <p>8 MR. LOOMIS: Daniel Loomis, 35th circuit. I</p> <p>9 am in agreement with the amendment that the court may</p> <p>10 authorize, but I had a question for the panel. What</p> <p>11 kind of expense has been added to the process because</p> <p>12 of the notebook being used?</p> <p>13 CHAIRPERSON BUITEWEG: You are asking this of</p> <p>14 the Indiana attorneys?</p> <p>15 MR. LOOMIS: Yes.</p> <p>16 MR. BELL: I can comment in a murder trial I</p> <p>17 did this summer there were probably 380 exhibits, so</p> <p>18 there were 15 notebooks for 15 jurors with the</p> <p>19 alternate, one for the court, one for the parties, and</p> <p>20 there was probably one of our paralegals billing by</p> <p>21 the hour, you know, at the courthouse for at least two</p> <p>22 days getting those together, so certainly there is</p> <p>23 xerox costs and things like that.</p> <p>24 MR. DIMOS: Though at the same time, at least</p> <p>25 before we had notebooks we were making copies of</p>

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1 exhibits for each juror anyway, and so I think that  
2 the cost is really somewhat incremental to having to  
3 put a binder in. The fact is we had to copy our  
4 exhibits and have enough for all the jurors. That  
5 same time was being spent making the copies, the same  
6 copying costs. It's just binding them together.

7 JUDGE HEATH: I might add that I was  
8 requiring each one of the lawyers to make a copy for  
9 each juror anyway before the notebook, because I  
10 didn't want to have to pass an exhibit around to each  
11 juror. The trial time is just exponent — you know,  
12 enlarged if you have to do that, so you want each  
13 juror to have a copy anyway.

14 CHAIRPERSON BUITEWEG: Mr. Romano, then  
15 Buchanan.

16 MR. ROMANO: Vince Romano, 3rd circuit. I  
17 wonder if the panelists — I have two issues having to  
18 do with content of these notebooks. I wonder if,  
19 particularly some of the folks that sit on the bench,  
20 if they are bothered by providing relevant statutory  
21 provisions to the jurors.

22 JUDGE HEATH: If I could address that.

23 MR. ROMANO: Second, at the very end, other  
24 appropriate information. How in the world is that  
25 other appropriate information going to be determined?

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1 JUDGE HEATH: I think —

2 MR. ROMANO: Those two issues, relevant  
3 statutory documents and other appropriate information.

4 JUDGE HEATH: The relevant statutory  
5 documents often end up in instructions anyway, final  
6 instructions. I, frankly, have never included  
7 statutes or other material in my trial notebooks.  
8 They have always been stipulated documents by the  
9 attorneys. I will admit that some attorney might want  
10 to get a statute in that.

11 I normally determine the admissibility of  
12 such statutes in argument through motions in limine  
13 before trial. So I really don't have a problem with  
14 including them, because it will have been  
15 predetermined that a statute applies or not.

16 Now, I have the rare case in which I had to  
17 wait for the evidence to see if I thought a statute  
18 did apply. I had a recent trial like that. I would  
19 not include that controversial statute — I shouldn't  
20 say controversial — that statute that I hadn't  
21 determined yet without evidence. I wouldn't put that  
22 in the trial notebook. I would leave it out until we  
23 hear the evidence and determine that it is a relevant  
24 statute, and then if it is relevant and the evidence  
25 shows that it is, then that becomes part of my final

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1 instructions anyway.

2 So I wouldn't get bogged down with this  
3 statutory stuff, because I think what you are going to  
4 find is the trial notebook is just going to be your  
5 stipulated, admissible documents, as counsel said  
6 beforehand. I have never had a case where it has been  
7 anything but that.

8 CHAIRPERSON BUITEWEG: Mr. Buchanan.

9 MR. BUCHANAN: Robert Buchanan from 17th  
10 circuit. I guess my question is more of a  
11 clarification. Is the notebook — I understand it's  
12 one, and is it agreed, meaning both parties have to  
13 agree what goes in the notebook would be my first  
14 question. The second, with respect to witness lists,  
15 is the expectation that this is the list that's filed  
16 early in the pre-trial process and we are disclosing  
17 our witnesses, and, obviously, as trial is a fluid  
18 process, we may change and decide we don't want to  
19 bring a particular witness or an expert has a  
20 scheduling conflict, what is the expectation with  
21 respect to the type of witness list that goes in this  
22 document? I guess that is my question.

23 JUDGE HEATH: I have not put witness lists in  
24 it, so I can't really answer that, but my only comment  
25 would be that if I did it would be the final witness

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1 list at the final status conference just days before  
2 trial, if at all, but we haven't done that.

3 MR. BUCHANAN: And in Indiana is it an agreed  
4 notebook, so what goes in both parties agree, so it's  
5 not —

6 JUDGE HEATH: Yes.

7 MR. BUCHANAN: — plaintiff gives them one,  
8 defense gives them one?

9 JUDGE HEATH: Yes.

10 MR. MIGLIO: I think the issue is what does  
11 the proposal say versus what has been the practice. I  
12 think what you are hearing is that there isn't a  
13 significant opposition to having a judge in his or her  
14 discretion decide that juries are entitled to see a  
15 jury notebook that's comprised of jury instructions  
16 under some circumstances and exhibits that have been  
17 admitted. Unfortunately the proposal uses the term  
18 reference documents, statutory provisions, and other  
19 appropriate information, which is highly unusual,  
20 which means that things get before the jury that have  
21 not been sanctioned through the evidentiary process,  
22 and that's the concern that I have as a trial lawyer,  
23 allowing that information to get in the jury's hands  
24 when it hasn't been admitted.

25 CHAIRPERSON BUITEWEG: State your name and

10 (Pages 37 to 40)

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1 circuit for the record.

2 MR. HERRINGTON: David Herrington from the

3 52nd circuit. I move to amend sub (E) as follows:

4 Next to the last line after "jury instructions," I

5 would put, after the word "instructions," "and," the

6 word "and," then go to the next line and delete "and

7 other appropriate information," and then pick up with

8 "to assist jurors in their deliberations."

9 CHAIRPERSON BUTTEWEG: If we could have

10 2.513(E), the proposal itself, back up on the screen,

11 it is on the screen, and make those proposed

12 modifications, then I will find out if Mr. Rombach

13 will agree to that modification.

14 MR. SHAPIRO: May I just point out that the

15 proposal does not mirror the actual text of the

16 proposed rule.

17 CHAIRPERSON BUTTEWEG: Yes, I understand.

18 JUDGE CAPRATHE: Could I make a comment,

19 Lori, while we are doing that?

20 CHAIRPERSON BUTTEWEG: Yes.

21 JUDGE CAPRATHE: I should have mentioned this

22 earlier when we were talking about the American Jury

23 Project, the ABA principles. How they came about was

24 the president of the ABA during his term made that the

25 purpose of his term, to attempt to improve the jury

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1 system in America, and so he appointed prosecutors,

2 defense attorneys, plaintiffs lawyers, defense

3 lawyers, professors and judges from all around the

4 country, and we met for over a year, and we heard what

5 people were doing all over the country, and we had a

6 symposium, invited interest groups to come to it, and

7 we came up with these principles.

8 So they do reflect what's happening around

9 the country, and with this particular one, it is in

10 the principles, and it indicates, I just would like to

11 read one short paragraph, it says, "Jurors in

12 appropriate cases be supplied with identical trial

13 notebooks, which may include such items as the court's

14 preliminary instructions, selected exhibits which have

15 been ruled admissible, stipulations of the parties,

16 and other relevant materials not subject to genuine

17 dispute." That was the suggestion of the principle in

18 that respect.

19 CHAIRPERSON BUTTEWEG: Thank you, Judge

20 Caprathe. That was very helpful.

21 I understand people are having difficulty

22 hearing towards the back of the room, so when you are

23 speaking make sure you speak right into the microphone

24 so you can be heard.

25 Mr. Rombach, we have a proposal to amend the

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1 proposal. Would you like to address that?

2 MR. ROMBACH: Yes, I tell you what, for the

3 purposes of our motions going forward, I would prefer

4 to actually go from the language of the proposed

5 statute rather than -- or the Court Rule rather than

6 go off of the kind of derivative language that we have

7 before us. So if there is no objection to that, at

8 this time I would like to amend this particular

9 proposal to reflect word for word what's actually in

10 front of you on the yellow sheets with the language

11 that our esteemed colleague, Mr. Andree from the 6th

12 circuit, had inserted about the permissive language

13 with may allow the parties.

14 CHAIRPERSON BUTTEWEG: Are there any

15 objections? And I will just give you some background

16 on this. Historically the Assembly has found itself

17 not to be particularly great drafters because of the

18 size of this body, and we have traditionally tried to

19 sort of keep away from doing group drafting, but if

20 the preference of the Assembly is to look at each

21 individual Court Rule and to make proposed

22 modifications to them, you know, that's your decision.

23 You are the Assembly, and that's your decision.

24 That's what Mr. Rombach is suggesting. The

25 proposals that you have are a bit, a bit more general

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1 in terms, but I am going to leave that up to the

2 Assembly, and that's what's been proposed, and I am

3 not hearing any objections.

4 So if I could, just by a voice vote, find out

5 if some of these preferences to address the actual

6 court ruling, which versus the proposals that you see

7 in the book. Is there a second to that?

8 VOICE: Support.

9 CHAIRPERSON BUTTEWEG: Is there any

10 discussion about that?

11 Everybody in favor.

12 Any opposition?

13 Abstentions?

14 Motion carries.

15 We will work with the actual Court Rules. I

16 hope that Nancy will be able to accommodate us with

17 that in terms of putting it up on the screen. So does

18 everybody follow now? We are now looking at the

19 yellow packet. We are on page five, and I need a

20 second to the amendment that was just made. Is there

21 a second on the friendly amendment?

22 VOICE: Support.

23 CHAIRPERSON BUTTEWEG: Now, Nancy, do you

24 need --

25 NANCY BROWN: I need the amendment again.

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<p>1 CHAIRPERSON BUITEWEG: Could you please</p> <p>2 restate that.</p> <p>3 MR. HERRINGTON: My proposed amendment is in</p> <p>4 sub (E), the second line from the bottom after "jury</p> <p>5 instructions" —</p> <p>6 VOICE: Madame Chair, point of order, we</p> <p>7 still can't hear.</p> <p>8 MR. HERRINGTON: Can you hear me now? My</p> <p>9 proposed amendment is in the first line up in the</p> <p>10 bottom of sub (E) after the words "jury instructions,"</p> <p>11 delete the comma, insert the word "and," and then</p> <p>12 going to the next line, which is the last line, after</p> <p>13 the word "exhibits," to delete the words "and other</p> <p>14 appropriate information," then pick up with "to</p> <p>15 assist jurors in their deliberations."</p> <p>16 CHAIRPERSON BUITEWEG: So, Mr. Rombach, why</p> <p>17 don't you read the rule as you are proposing it now in</p> <p>18 its entirety.</p> <p>19 MR. ROMBACH: The proposal as it now stands</p> <p>20 is the court may — the court may in its, or in the</p> <p>21 court's discretion, allow counsel in civil and</p> <p>22 criminal cases to provide the jurors with a reference</p> <p>23 document or notebook, the contents of which should</p> <p>24 include, which is not limited to, witness lists,</p> <p>25 relevant statutory provisions, and, in cases where the</p>	<p>1 the panel here from Indiana, when I was a public</p> <p>2 defender we did not have these juror books, so I can't</p> <p>3 say. I will tell you most of my, when I was a public</p> <p>4 defender, most of our cases did not have many</p> <p>5 exhibits, so I doubt it would affect the budget too</p> <p>6 much.</p> <p>7 MR. KROHNER: The way I am looking at the</p> <p>8 rule as it has been proposed, it mostly pertains to</p> <p>9 civil cases and not criminal cases, and so I would</p> <p>10 propose that we strike the word "criminal" out of this</p> <p>11 particular one, because I am concerned from the</p> <p>12 standpoint of the cost factor of whether or not we</p> <p>13 will be able to afford that in the appointed cases.</p> <p>14 CHAIRPERSON BUITEWEG: Mr. Rombach.</p> <p>15 JUDGE CAPRATHE: Can I answer that?</p> <p>16 MR. ROMBACH: At this time I'd prefer you</p> <p>17 move that through the Assembly, because I believe that</p> <p>18 that's going to lop off half of the rules and text, so</p> <p>19 I am not going to accept that as a friendly amendment.</p> <p>20 CHAIRPERSON BUITEWEG: It's been moved, is</p> <p>21 there a second to strike "criminal"?</p> <p>22 VOICE: Support.</p> <p>23 CHAIRPERSON BUITEWEG: Is there discussion?</p> <p>24 Judge Caprathe.</p> <p>25 JUDGE CAPRATHE: The court would —</p>
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<p>1 interpretation of a document is at issue, copies of</p> <p>2 the relevant document. The court and the parties may</p> <p>3 supplement the reference document during trial with</p> <p>4 copies of the preliminary jury instructions and</p> <p>5 admitted exhibits to assist the jurors in their</p> <p>6 deliberations.</p> <p>7 MR. ROMANO: Point of order. So you are</p> <p>8 accepting his as a friendly amendment?</p> <p>9 MR. ROMBACH: Yes.</p> <p>10 CHAIRPERSON BUITEWEG: Yes, he was, and its</p> <p>11 been seconded.</p> <p>12 MR. ROMBACH: I am striking, as a friendly</p> <p>13 amendment, "and other appropriate information."</p> <p>14 CHAIRPERSON BUITEWEG: Is there any</p> <p>15 discussion on the reference documents Court Rule as</p> <p>16 amended?</p> <p>17 MR. KROHNER: Martin Krohner, 6th circuit.</p> <p>18 My question goes to the — not on? Supposed to be on.</p> <p>19 There we go.</p> <p>20 My question revolves around the inclusion of</p> <p>21 the word "criminal" in this, the criminal cases, for</p> <p>22 the question that what has been the Indiana practice</p> <p>23 as it pertains to appointed cases, and how has that</p> <p>24 affected your appointed counsel budget?</p> <p>25 MR. BELL: Being the only criminal lawyer on</p>	<p>1 VOICE: Don't we have a previous motion</p> <p>2 pending and we were going to debate the friendly</p> <p>3 amendment by the gentleman standing there?</p> <p>4 CHAIRPERSON BUITEWEG: Yes, we do. You are</p> <p>5 correct.</p> <p>6 We will take a vote on the amended Court</p> <p>7 Rule, and then we will move forward with the motion to</p> <p>8 amend it to strike the word "criminal."</p> <p>9 Does everybody understand what we are voting</p> <p>10 on at this time? We are voting on the proposal that</p> <p>11 MCR 2.513(E) read as follows: Reference Documents.</p> <p>12 The court may, in the court's discretion, allow</p> <p>13 counsel in civil and criminal cases to provide the</p> <p>14 jurors with a reference document or notebook, the</p> <p>15 contents of which should include, but which is not</p> <p>16 limited to, witness lists, relevant statutory</p> <p>17 provisions, and, in cases where the interpretation of</p> <p>18 a document is at issue, copies of the relevant</p> <p>19 document. The court and the parties may supplement</p> <p>20 the reference document during trial with copies of the</p> <p>21 preliminary instructions and admitted exhibits to</p> <p>22 assist jurors in their deliberations.</p> <p>23 I will take a vote on that, and then we will</p> <p>24 entertain — I am sorry, I am told I don't need a vote</p> <p>25 on this. Strike that. I don't need a vote yet.</p>



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<p>1 So the motion to amend the proposal to strike 2 the word "criminal" is before the Assembly, and I did 3 hear a second. Is there any discussion on the 4 proposal to eliminate the word "criminal" from this 5 Court Rule? And I am looking, so if you have got 6 discussion on that, then you can come up to the mike 7 on this. You may only come to the microphone one time 8 on each proposal.</p> <p>9 MS. KIRSCH-SATAWA: I am Lisa Kirsch-Satawa, 10 6th circuit, in support of the motion to strike "and 11 criminal." I think this would put a tremendous burden 12 on indigent counsel. As this Assembly is very well 13 aware of, Michigan has the second lowest fees for our 14 court-appointed attorney, court-appointed counsel, and 15 so they have to do an extreme amount of volume in 16 order to make a living and provide the service and 17 representation that they do. We are adding one more 18 step in order for them to be, quote-unquote, 19 effective, and I think it would be extremely 20 burdensome on criminal cases, but even more so in 21 cases where you do have an indigent defendant.</p> <p>22 CHAIRPERSON BUITEWEG: Thank you. Is there 23 further comment on that particular motion?</p> <p>24 MS. STANGL: Terri Stangl from the 10th 25 circuit. I am also very sensitive to the cost issue</p>	<p>1 fees on that case.</p> <p>2 MS. POWELL: And the jury instructions that 3 were provided, did the court provide the jury 4 instructions to the jurors, or did the defense do 5 that?</p> <p>6 MR. BELL: The court provided the jury 7 instructions.</p> <p>8 MS. POWELL: Copies for each?</p> <p>9 MR. BELL: Copies for each, yes.</p> <p>10 MS. POWELL: Thank you.</p> <p>11 CHAIRPERSON BUITEWEG: Yes.</p> <p>12 MS. SAWYER: Elaine Sawyer, 24th circuit. 13 Majority of my practice is indigent representation. I 14 don't think "criminal" should be taken out. I think 15 we have in there may in their discretion allow, and if 16 it's going to be a burden, an expense, I think that 17 can be taken up with the individual judge and a 18 decision can be made. I think this would be helpful 19 in certain criminal cases to supply this notebook to 20 jurors, depending on what type of case it is. So I am 21 not supportive of taking out criminal.</p> <p>22 CHAIRPERSON BUITEWEG: I am going to ask 23 everybody to be mindful of the time. We do need to 24 put another proposal before the Assembly at 11:30. If 25 necessary we can reconvene on these issues after the</p>
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<p>1 for indigent defendants. However, as I read the rule 2 now, it's only about allowing it, not requiring it, 3 and if we need additional language to make that clear, 4 I would support it, but it seems to me we should not 5 prevent complicated criminal cases from using this 6 when appropriate, but I absolutely agree it should not 7 be required.</p> <p>8 CHAIRPERSON BUITEWEG: Thank you. Is this on 9 this particular motion?</p> <p>10 MS. POWELL: Yes.</p> <p>11 CHAIRPERSON BUITEWEG: Okay.</p> <p>12 MS. POWELL: Jaimie Powell from the 3rd 13 circuit. I work for the Wayne County Prosecutor's 14 Office. Again, the cost issue is a concern. It's not 15 uncommon for our prosecutors to be doing two and three 16 jury trials within a week. It would be almost 17 impossible for us to put together these binders. We 18 have limited resources as it is. I did have a question 19 for Mr. Bell. Maybe I should table that until --</p> <p>20 CHAIRPERSON BUITEWEG: You may ask it.</p> <p>21 MS. POWELL: Mr. Bell, when you were doing 22 your murder case, did the prosecutor bear the cost at 23 all with you, or was it the defense that --</p> <p>24 MR. BELL: That was an indigent case, so that 25 was appointed case, and so the State paid for all the</p>	<p>1 luncheon. If a point has already been made and you 2 have heard it, I would ask that you please be mindful 3 of the time and not make the same point again.</p> <p>4 JUDGE CAPRATHE: Can I just make that one 5 point?</p> <p>6 CHAIRPERSON BUITEWEG: Yes.</p> <p>7 JUDGE CAPRATHE: With it being may, either 8 the court would pay for it out of the court's budget 9 or would not do it, so that I think Terri Stangl 10 answered the question.</p> <p>11 CHAIRPERSON BUITEWEG: Yes, sir.</p> <p>12 MR. PAUL: Rick Paul from the 6th circuit. 13 By adding the Jerry Andree amendment, deleting the 14 "must encourage" to "the court may, in the court's 15 discretion, permit," and I think that would alleviate 16 some of the concerns between criminal and civil 17 dockets as well.</p> <p>18 MR. KANTOR: Alan Kantor, 6th judicial 19 circuit. I just had a question for the gentlemen from 20 Indiana in terms of their experience with respect to 21 finding errors, missing exhibits, missing pages, 22 whether that occurs during the course of the trial or 23 it's found out afterwards, whether or not that would 24 be grounds for a mistrial or potentially reversible 25 error on appeal.</p>

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<p>1 JUDGE HEATH: I had one case, it was a 2 personal injury case in which counsel forgot to 3 redact, and we go over this in chambers beforehand, 4 any reference on the medical records about insurance 5 plans. And, you know, that did open the door to some 6 insurance problems, so it does happen. I have found 7 it to be extremely rare. I have never found it to 8 cause any kind of mistrial. I have never been 9 reversed on any matter that was in the trial notebook, 10 and we have been doing it -- I have been doing trial 11 notebooks for about eight, nine years, the last 12 several years under our new rules, but I am doing the 13 same thing I used to do. So I have not found it to be 14 a problem.</p> <p>15 Counsel is usually very careful and usually 16 the adversarial process itself takes care of problems 17 that can arise in the notebook. Counsel is usually 18 very careful about what their opponent is doing 19 putting in that notebook. And, again, the motion in 20 limine process prior to trial also takes care of a lot 21 of issues. I have not had a problem so far.</p> <p>22 CHAIRPERSON BUITEWEG: All right. Please try 23 not to be distracted by what's been going on behind 24 me. The record is the record. We have a transcript 25 of the proceedings. We know what we are voting on.</p>	<p>1 yell your answer. It makes it very difficult for the 2 chair. I would ask that we approve Kathy Kakish, 3 Barry Poulson and Colleen Cullitan from the 3rd, 1st, 4 and 2nd circuits respectively as the tellers. May I 5 have a motion?</p> <p>6 VOICE: So moved.</p> <p>7 CHAIRPERSON BUITEWEG: And support?</p> <p>8 VOICE: Support.</p> <p>9 CHAIRPERSON BUITEWEG: And all those in favor 10 of these being the tellers say yes.</p> <p>11 Objections?</p> <p>12 Abstentions?</p> <p>13 Motion carries.</p> <p>14 Please, tellers, if you could count up the 15 yes votes.</p> <p>16 VOICE: Point of order. What is the vote? 17 Are the stand-ups against it or for it?</p> <p>18 CHAIRPERSON BUITEWEG: If you are voting yes 19 in favor of deleting the word "criminal."</p> <p>20 VOICE: One more point of order. Is this 21 with or without the amendment "must"? Is this on 22 "may"?</p> <p>23 CHAIRPERSON BUITEWEG: This is on the "may."</p> <p>24 VOICE: This is a "may"?</p> <p>25 CHAIRPERSON BUITEWEG: Yes. All the friendly</p>
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<p>1 What's behind me is not the transcript, so try not to 2 get distracted and worried about that. Just try to 3 follow with the discussion.</p> <p>4 Yes.</p> <p>5 MR. REISING: Bill Reising, 7th circuit. I 6 have one further friendly amendment consistent with 7 Jerry Andree's earlier amendment. Third line down --</p> <p>8 VOICE: Point of order, we still have an 9 amendment pending.</p> <p>10 CHAIRPERSON BUITEWEG: Right, we have a 11 motion on the floor right now, and so if you don't 12 have any discussion about that, I will ask you to hold 13 off on your comment for a moment.</p> <p>14 Is there any other discussion on the motion 15 pertaining to the deletion of the word "criminal" from 16 this Court Rule? The Court Rule.</p> <p>17 Then may I hear by vote of the Assembly, 18 everybody who is in favor of deleting the word 19 "criminal," please say yes.</p> <p>20 Opposed?</p> <p>21 Abstentions?</p> <p>22 We have tellers, and I am going to ask 23 everybody who voted yes to stand up, and I would ask 24 the tellers to please count and come forward.</p> <p>25 In the future I would ask you to please not</p>	<p>1 amendments have been accepted. This has not been 2 accepted. We are voting on this one.</p> <p>3 If you want to strike the word "criminal," 4 you should be standing.</p> <p>5 (Vote being counted.)</p> <p>6 CHAIRPERSON BUITEWEG: As soon as the tellers 7 give me the number of yeses, I will ask the yeses to 8 sit down and have the noes stand up.</p> <p>9 Sir, in the back of the room without a badge, 10 are you an Assembly member? Could you put your badge 11 on, please, so we know to count your vote.</p> <p>12 Please sit down, and everybody who wishes to 13 leave the word "criminal" in the Court Rule please 14 stand up.</p> <p>15 Mr. Clerk, do you have a count?</p> <p>16 CLERK GARDELLA: 65.</p> <p>17 CHAIRPERSON BUITEWEG: Okay. You may sit 18 down.</p> <p>19 For the record, we have 40 people who would 20 like to remove the word "criminal" from the Court Rule 21 and 65 who want to leave it in, so the motion to 22 remove the word "criminal" falls, and it will remain 23 in.</p> <p>24 Is there any further discussion regarding the 25 Court Rule regarding reference documents?</p>

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<p>1 MR. REISING: I have one further friendly 2 amendment. 3 CHAIRPERSON BUTTEWEG: Yes, sir. 4 MR. REISING: As I indicated earlier -- 5 Bill Reising, 7th circuit, and I am making a friendly 6 motion that the third line down of subsection (E), the 7 word "should" be changed to the word "may" to make the 8 proposed Court Rule consistent internally and to give 9 the court the discretion it needs at the time that 10 such a notebook is put together. Thank you. 11 CHAIRPERSON BUTTEWEG: Is that amendment 12 accepted, Mr. Rombach? 13 MR. ROMBACH: Yes, I accept that as a 14 friendly amendment. 15 CHAIRPERSON BUTTEWEG: Is there a second to 16 the friendly amendment. 17 VOICE: Support. 18 CHAIRPERSON BUTTEWEG: Any discussion? Is 19 there further discussion? 20 MR. LOOMIS: Daniel Loomis, 35th judicial 21 circuit. 22 The second friendly amendment that struck the 23 words "other appropriate information" I think has the 24 negative effect of limiting how the court and the 25 parties may supplement this notebook. For example, we</p>	<p>1 with the rule that Judge Caprathe read, but I would 2 add a friendly amendment which addresses the concern 3 of not only indigent criminal defense, but also those 4 that work in legal aid. I would move that we add a 5 friendly amendment that says, If the court determines 6 that one or more parties are indigent, a notebook 7 shall not be provided to the jurors unless all parties 8 consent. 9 CHAIRPERSON BUTTEWEG: Mr. Rombach, there has 10 been a friendly amendment request. Your response. 11 MR. ROMBACH: Again, I am not going to accept 12 that as a friendly amendment simply because I think it 13 would be against the spirit of the vote that the 14 Assembly had taken before. If you want to offer that 15 as an amendment for which the Assembly could vote, 16 that would be allowable under the rules. 17 MR. CRAMPTON: I would offer that as a rule. 18 CHAIRPERSON BUTTEWEG: Would you please state 19 your motion again. 20 MR. CRAMPTON: The amendment would be to add 21 a sentence at the end of whatever rule ultimately gets 22 adopted that says, If the court determines that one or 23 more parties are indigent, a notebook shall not be 24 provided to the jurors unless all parties consent. 25 CHAIRPERSON BUTTEWEG: Did your motion also</p>
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<p>1 may want to supplement it with the final instructions, 2 but it only allows for preliminary jury instructions 3 during the trial. So I think that has a negative 4 effect. 5 MR. ROMBACH: If I may, Tom Rombach, but 6 "which is not limited to" coming after "which may 7 include," so I believe that would be broad enough 8 language that would allow any other supplemental 9 material. 10 MR. LOOMIS: But doesn't that last sentence 11 refer to supplementing during the trial and the first 12 sentence at the beginning? 13 MR. ROMBACH: Again, at this point I have 14 already accepted that as a friendly amendment. For 15 logistical purposes I don't think I should reconsider 16 it. 17 CHAIRPERSON BUTTEWEG: Are there other 18 comments? 19 MR. CRAMPTON: Jeff Crampton, 17th circuit. 20 I am troubled that this rule doesn't even use the word 21 "exhibit." When we were talking about or Judge Heath 22 was talking about what is in notebooks in Indiana, or 23 at least in his courtroom, he said typically it is 24 primarily just exhibits, and this rule doesn't even 25 use that. Frankly, I would like to see us replace it</p>	<p>1 include the request to add the word "exhibits," 2 "stipulated exhibits"? 3 MR. CRAMPTON: Whatever -- I used the word 4 notebook. This was very quickly and unartfully 5 drafted, but with regards to "with a reference 6 document or notebook, the contents of which shall 7 include," that's what I am talking about. So perhaps 8 it should say, "If the court determines that one or 9 more of the parties are indigent, a reference document-- 10 or notebook shall not be provided to the jury unless 11 all parties consent." 12 CHAIRPERSON BUTTEWEG: Is there a second to 13 that? 14 VOICE: Support. 15 CHAIRPERSON BUTTEWEG: Is there discussion on 16 the motion? 17 MR. ANDREE: Point of order. May I address 18 that again, or am I precluded from addressing that 19 again? I thought my amendment already covered that. 20 CHAIRPERSON BUTTEWEG: Yes, it's new items. 21 I have been asked to restate the motion, because for 22 some reason our technical information isn't working. 23 It is more than five words. It needs to be in 24 writing. Can you please bring it to the chair. 25 The motion is to add to the end of the Court</p>

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<p>1 Rule, "If the court determines that one or more 2 parties are indigent, a notebook or reference document 3 shall not be provided to the jurors unless all parties 4 consent." One moment. 5 And that has been seconded. Mr. Reiser, I 6 think you were next in line. 7 MR. REISER: John Reiser, 22nd circuit. I 8 rise in opposition of the proposed amendment. I am an 9 assistant prosecuting attorney, and I can't imagine 10 the expense that it's going to be for these trial 11 notebooks. It's going to be 12 plastic notebooks that 12 you reuse for your trials. It's going to be, in a 13 drunk driving case, the data master ticket or the 14 breath result, maybe the jury instructions related to 15 drunk driving. In an assault case it's going to be 16 the jury instructions, it's going to be some 17 photographs. I don't think it's going to be that 18 expensive. 19 Color printers are common nowadays. We 20 provide the defense Bar currently with photographs, 21 color photographs. We provide them with all our 22 documents, so I just don't think that it's going to be 23 that cumbersome of a burden. 24 I don't want to be enjoined from putting 25 together a short trial notebook if I want to do that</p>	<p>1 court the discretion already to allow or disallow the 2 use of the notebook in any given case, which, 3 therefore, would allow the court to protect indigents 4 from being unduly burdened by the preparation of a 5 notebook. 6 CHAIRPERSON BUI TEWEG: Further discussion? 7 Yes, sir. 8 MR. POULSON: Barry Poulson, 1st circuit. 9 The budget in our county for indigent defense is 10 105,000. It's going to be that next year, because 11 it's always been that. The county commissioners have 12 provided that much money. The three attorneys slated 13 to carry that burden next year deal with 15 cases a 14 week, and the question -- I haven't seen a color 15 printer in our county yet, and so I suspect that this 16 sort of a refinement should be refined by adding at 17 the expense of the State of Michigan, but I am not 18 making that as an amendment. I don't see how it could 19 possibly be funded. 20 MS. CARSON: Daryl Carson from 3rd circuit. I 21 work with Wayne County Prosecutor's Office. We have a 22 bifurcated system. We have 28 courtrooms in our 23 criminal division, and we have one prosecutor for each 24 one of those courtrooms. 25 The burden of having these copies made is</p>
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<p>1 for trial strategy purposes, and I would urge others 2 to vote against this. Thank you. 3 MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th 4 circuit. I would be in support of this language with 5 a friendly amendment to it, and that would be that 6 it's added that the expense of the notebook will 7 become -- actually strike that. That the notebook 8 will be provided by the court and at public expense. 9 In a criminal case we are required to file a 10 motion for an investigator or for an expert to be paid 11 at public expense, and I think that to avoid the 12 discretionary component that could be prejudicial, it 13 should be right in the rule that it would be, in an 14 indigent situation, it would be provided by the court 15 and at public expense. 16 CHAIRPERSON BUI TEWEG: Is the friendly 17 amendment accepted by the moving party? 18 MR. CRAMPTON: If the friendly amendment, if 19 I understand it right, is that it will not be provided 20 to the jurors unless all parties consent or a notebook 21 will be provided by the court or at public expense, 22 then it's accepted. 23 JUDGE KENT: Wally Kent, 54th judicial 24 circuit. I object to the proposed amendment on the 25 basis I believe it's well covered by allowing the</p>	<p>1 going to fall on the prosecutor's office, so not only 2 is it burdensome for our prosecutors, but it's also 3 burdensome for our budget, which we have little or 4 none of. 5 MS. STANGL: Terri Stangl from the 10th 6 circuit. I represent indigents in civil cases, and if 7 my indigent client or I feel that it's the best thing 8 for us to use a notebook, I would hate to be barred 9 because the opposing party in a divorce or landlord 10 tenant case didn't want it, so I oppose it the way 11 it's written. 12 CHAIRPERSON BUI TEWEG: Further discussion? 13 Does everybody understand the motion? 14 The motion is to add to the end of this 15 exhibit if the court determines -- or this court rule 16 rather -- if the court determines that one or more 17 parties are indigent, a notebook or reference document 18 will not be provided to the jurors unless all parties 19 consent, unless it is provided by the court at the 20 public's expense. 21 Unless it will be provided by the court at 22 public expense. By the court or at the public's 23 expense? 24 Who made the friendly amendment? 25 MS. KIRSCH-SATAWA: I did.</p>

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<p>1 CHAIRPERSON BUITEWEG: What was the exact 2 wording? It should be in writing. 3 MS. KIRSCH-SATAWA: I did have it in writing, 4 but I don't know what happened to the piece of paper. 5 It should say "and the notebook," instead of "or," 6 "will be provided by the court or at public expense." 7 CHAIRPERSON BUITEWEG: Thank you. Could you 8 please bring that to the clerk, the written amendment. 9 Okay. There has been a motion made and 10 seconded. I see no further discussion. Please do not 11 yell your answer. 12 All those in favor of this amendment, please 13 say yes. 14 All those opposed please say no. 15 Okay. The motion is denied, falls. 16 Yes, sir. 17 MR. GIGUERE: Gary Giguere, 9th circuit. I 18 had a proposed friendly amendment which would address 19 the previous gentleman's concern regarding the 20 supplement to the notebook, and I would ask the movant 21 if we removed the word "preliminary" with the jury 22 instructions, that would allow any jury instructions, 23 preliminary or final, to be supplemented to the 24 notebook, so I would make that as a friendly amendment 25 to remove "preliminary."</p>	<p>1 friendly amendments. 2 May I have permission to withdraw the 3 division, person who moved for division? 4 VOICE: Yes. 5 CHAIRPERSON BUITEWEG: Thank you. Motion 6 passes. 7 More than one person apparently called for 8 division. You are not withdrawing? 9 MR. BARTON: I am not withdrawing. 10 CHAIRPERSON BUITEWEG: Stand up if you said 11 yes. Sorry. Tellers, please take the count. This is 12 if you are voting yes to 2.513(E) with the friendly 13 amendments. I am sorry they are not showing on the 14 screen. Hopefully you have been making notes. We 15 will try to fix that during our break. 16 (Vote being counted.) 17 CHAIRPERSON BUITEWEG: Please be seated, and 18 if you are voting no, please stand up. 19 You may be seated, and the vote was 59 yes, 20 36 no. The motion carries. 21 The next Court Rule that is up for 22 consideration is 2.513(A). Mr. Rombach, if you would 23 come forward and read that into the record. 24 MR. ROMBACH: I would just direct the 25 Assembly's attention to page ten under the subsection</p>
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<p>1 CHAIRPERSON BUITEWEG: Mr. Rombach. 2 MR. ROMBACH: If that's a friendly amendment, 3 I would accept it. 4 CHAIRPERSON BUITEWEG: Are there further 5 comments or questions before we take a vote on 6 reference documents? Looks like we have got one more. 7 VOICE: Call the question. 8 CHAIRPERSON BUITEWEG: The question has been 9 called, and all those in favor of calling the question 10 say aye. 11 Any opposed? 12 Motion carries. 13 Anybody in favor of adopting the Court Rule 14 reference documents contained in the friendly 15 amendments that have been accepted, please say yes. 16 Any opposed? 17 Any abstentions? 18 Motion carries. 19 Let us move forward to the next Court Rule. 20 VOICE: We have a call on that. 21 VOICE: Division. 22 CHAIRPERSON BUITEWEG: Division has been 23 called. If you voted yes, please — if you voted yes, 24 please stand and the tellers will take the count, if 25 you are voting in favor of Rule 2.513(E) with the</p>	<p>1 jury reform. 2 As we have decided previously, rather than 3 move the issue as outlined in our packet of materials, 4 I am actually going to move the language as proposed 5 by the court seeking our comment, that being on the 6 fourth page of your yellow sheet packet. I am moving 7 for adoption of Rule 2.513, conduct of jury trial, 8 subsection (A) preliminary instructions. After the 9 jury is sworn and before evidence is taken, the court 10 shall provide the jury with pre-trial instructions 11 reasonably likely to assist in its consideration of 12 the case. Such instructions at a minimum shall 13 communicate the duties of the jury, trial procedure, 14 and the law applicable to the case as are reasonably 15 necessary to enable the jury to understand the 16 proceedings and the evidence. The jury also shall be 17 instructed about the elements of all civil claims or 18 all charged offenses, as well as the legal 19 presumptions and burdens of proof. The court shall 20 provide each juror with a copy of such instructions. 21 MCR 2.512(D)(2) does not apply to such preliminary 22 instructions. Do I have a second? 23 VOICE: Second. 24 CHAIRPERSON BUITEWEG: All right. It's been 25 moved and seconded. Is there discussion regarding</p>

all?"

jury  
order

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1 2.513(A)?  
2 Seeing none, all those in favor of adopting  
3 the Court Rule as read into the record by Mr. Rombach,  
4 please say yes.  
5 Any opposed?  
6 Abstentions?  
7 Motion carries.  
8 Let's move on to the next Court Rule, which  
9 is 2.513(N)(2) final instructions. Mr. Rombach.  
10 MR. ROMBACH: Again, I would direct your  
11 attention to page eleven of the materials that were  
12 originally sent by mail that has this issue  
13 identified, particularly on line two, instead of "is,"  
14 you put in an "if." That puts the issue in a  
15 nutshell.  
16 But at this time, pursuant to our new  
17 procedure, I am moving for adoption of MCR 2.513(N)(2)  
18 and (3), final instructions to the jury. That can be  
19 found on page seven of the yellow packet, final  
20 instructions to the jury, (N)(1), Before closing  
21 arguments, the court -- actually that's (1). I am  
22 moving (2) and (3).  
23 Subsection (2), solicit questions about final  
24 instructions. As part of the final jury instructions,  
25 the court shall advise the jury that it may submit in

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1 a sealed envelope given to the bailiff any written  
2 questions about the jury instructions that arise  
3 during deliberations. Upon concluding the final  
4 instructions, the court shall invite the jurors to ask  
5 any questions in order to clarify the instructions  
6 before they retire to deliberate.  
7 If questions arise, the court and the parties  
8 shall convene, in the courtroom or by other  
9 agreed-upon means. The question shall be read into  
10 the record, and the attorneys shall offer comments on  
11 an appropriate response. The court may, in its  
12 discretion, provide the jury with specific response to  
13 the jury's question, but the court shall respond to  
14 all questions asked, even if the response consists of  
15 a directive for the jury to continue its  
16 deliberations.  
17 Subsection (3), copies of final instructions.  
18 The court shall provide each juror with a written copy  
19 of the final jury instructions to take to the jury  
20 room for deliberation. The court, in its discretion,  
21 may provide the jury with a copy of electronically  
22 recorded instructions.  
23 Madam Chair, I move that for adoption. I  
24 seek support.  
25 Is there support?

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1 VOICE: Support.  
2 CHAIRPERSON BUITEWEG: Discussion?  
3 VOICE: Is it just (2) and (3) that we are  
4 talking about right now?  
5 CHAIRPERSON BUITEWEG: That is what the  
6 motion is at this time.  
7 MR. LOOMIS: Daniel Loomis, 35th circuit. I  
8 propose a friendly amendment in paragraph two that we  
9 delete the words "in a sealed envelope given."  
10 CHAIRPERSON BUITEWEG: Mr. Rombach.  
11 MR. ROMBACH: At this time I am going to  
12 oppose the friendly amendment, more for logistical  
13 purposes, simply because I think the court is seeking  
14 our comment on the proposals as delivered to us, and  
15 rather than getting into drafting on the floor on the  
16 minutia, I prefer we move issue forward, so I am not  
17 going to accept this as a friendly amendment.  
18 MR. LOOMIS: Comment. I think that was  
19 pointed out by the judges in their fax to the Assembly  
20 just recently, their concern about that.  
21 JUDGE CAPRATHE: Can we speak to any of these  
22 issues or not, as a point of order?  
23 CHAIRPERSON BUITEWEG: You do have floor  
24 privileges, so, yes, you may.  
25 JUDGE CAPRATHE: I would like to ask the

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1 Assembly to consider making that discretionary.  
2 Recorder's Court, for example, judges there tell me  
3 that they have one-day trials and it would just be  
4 impossible if they had to make written copies of all  
5 the instructions. They just don't have the ability to  
6 do it. So I would say if we could make it  
7 discretionary, it would depend on the court, the final  
8 instructions.  
9 CHAIRPERSON BUITEWEG: Is that regarding  
10 number (2) and/or (3)?  
11 JUDGE CAPRATHE: Number (2) and (3), I am  
12 sorry.  
13 CHAIRPERSON BUITEWEG: (2) and (3).  
14 Mr. Rombach.  
15 JUDGE CAPRATHE: If I do have floor  
16 privileges, I can make a motion, that would be my  
17 motion.  
18 MR. ROMBACH: We are just seeking clarity  
19 from the parliamentarian here.  
20 So, Judge, you are suggesting that we switch  
21 the "shall" in subsection (2) on the second line to  
22 "may," the "shall" in line five, "the court may invite  
23 the jury to ask questions," you want that to read as  
24 permissive language as well?  
25 JUDGE CAPRATHE: Yes.

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1 MR. ROMBACH: In sub (3) you are asking in  
2 the first line "the court may provide each juror,"  
3 instead of "shall?"

4 JUDGE CAPRATHE: Yes.

5 MR. ROMBACH: I will accept as a friendly  
6 amendment.

7 CHAIRPERSON BUITEWEG: Is there further  
8 discussion regarding N(2) and/or (3).

9 MR. HERRINGTON: David Herrington, 52nd  
10 circuit. I am opposed to the entire section (2). I  
11 think it basically preempts part of the deliberative  
12 process on the part of the juries. When juries get  
13 their final instructions, they really haven't had a  
14 chance to digest it. If they get written copies,  
15 that's fine, but to ask the jury at the close of the  
16 instructions do you have any questions about the final  
17 instructions I think is premature, and also I think  
18 that it detracts from the deliberative process once  
19 they go to the jury room, because if they are talking  
20 about an instruction involving specific intent or  
21 wanton and willful or things like that, I think that's  
22 open to discussion, and I am not sure the judge can  
23 answer right off the bat without side bar with counsel  
24 and so on, so forth. So I think there is actually  
25 some judicial economy that's at stake there.

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1 So I move to delete section (2) from sub (N).

2 CHAIRPERSON BUITEWEG: Is there a second to  
3 the motion?

4 VOICE: Support.

5 JUDGE GIOVAN: Can I make a comment about  
6 that? Actually it's been my practice at the close of  
7 every jury instruction I have given in the last 10 or  
8 15 years, I say, just before they leave, I say, "Do  
9 any of you have any questions about my instructions,  
10 anything that isn't quite clear?" That's exactly the  
11 way I say it. And I will say, first of all, I never  
12 get a response.

13 MR. SHAPIRO: You are so clear.

14 JUDGE GIOVAN: But once in a while, once in a  
15 while I do, and it's usually sometimes they say, just  
16 a point of clarification -- well, it's not been a  
17 problem, but at least I give them the opportunity.

18 And point of personal privilege. I made, in  
19 an excess of optimism, I told my jury trial to come  
20 back this afternoon, so if you don't see me here this  
21 afternoon, it's not because I don't think this is all  
22 very important. It is, but I have to honor that, and  
23 it's my second jury trial this week, and the reason I  
24 am able to schedule a second jury trial this week is  
25 because I didn't have to provide them with a copy of

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1 the written instructions for the first trial.

2 CHAIRPERSON BUITEWEG: Is there further  
3 discussion regarding the motion to eliminate section  
4 (2) from subsection (N)?

5 Okay. Hearing none, all those in favor of  
6 eliminating subsection (2) from section (N), please  
7 say yes.

8 All those opposed say no.

9 Motion fails.

10 Is there further discussion regarding (N)(2)  
11 or (3). Yes, Ms. Kirsch.

12 MS. KIRSCH-SATAWA: I have a friendly  
13 amendment to section (2) that language be added at the  
14 end that says, "The sealed envelope shall be made part  
15 of the record and preserved for appeal."

16 CHAIRPERSON BUITEWEG: Is there a second?

17 VOICE: Second.

18 CHAIRPERSON BUITEWEG: Let me let Mr. Rombach  
19 think about that for a moment. Could you please bring  
20 it forward in writing.

21 MS. KIRSCH-SATAWA: My colleagues in the 17th  
22 circuit have pointed out a friendly amendment to my  
23 friendly amendment, so I would like to change it.

24 CHAIRPERSON BUITEWEG: Would you like to  
25 restate your request for a friendly amendment?

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1 MS. KIRSCH-SATAWA: You have my piece of  
2 paper now, but I would like it to say that the sealed  
3 envelope and its contents be preserved, become part of  
4 the record and be preserved for appeal.

5 CHAIRPERSON BUITEWEG: One moment, please.

6 MR. ROMBACH: Although I think if there is  
7 questions arise, they shall be read into the record,  
8 so it would be preserved under those circumstances. I  
9 would accept this as a friendly amendment.

10 VOICE: Support.

11 CHAIRPERSON BUITEWEG: It's been accepted.  
12 Is there any further discussion regarding 2.513(N)(2)  
13 and/or (3)?

14 VOICE: Call the question.

15 CHAIRPERSON BUITEWEG: All those in favor say  
16 yes.

17 All those opposed say no.

18 Motion carries. And that completes cluster  
19 number one.

20 At this point it's 11:20. We have two  
21 panelists who are unable to be here this afternoon  
22 after the lunch, and we have to take the proposal  
23 regarding trust overdraft accounts at 11:30. I am  
24 going to exercise privileges of the chair and ask  
25 those two panelists if there is anything further they

19 (Pages 73 to 76)

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<p>1 would like to comment or discuss upon at this time 2 before we take the next issue. And we may have time 3 to resume more on the jury reforms before lunch, but 4 we will take it as it comes.</p> <p>5 Judge Caprathe, Judge Giovan.</p> <p>6 JUDGE CAPRATHE: There is one very 7 controversial proposal, and I would just like to speak 8 on behalf of it, because I may be one of the very few 9 that would so, and it is on juries discussing the 10 evidence during recesses. And I just want to read a 11 short paragraph from the principles, commentary that 12 might help in considering that.</p> <p>13 The rule or the principle is that jurors in 14 civil cases may be instructed that they will be 15 permitted to discuss the evidence among themselves in 16 the jury room during recesses from trial when all are 17 present as long as they reserve judgment about the 18 outcome of the case until deliberations.</p> <p>19 And the commentary indicates, "In exercising 20 its discretion to limit or prohibit jurors' permission 21 to discuss the evidence among themselves during 22 recesses, the court should consider the length of the 23 trial, the nature and complexity of the issues, and 24 the makeup of the jury and other factors that may be 25 relevant on a case-by-case basis," and that quotes the</p>	<p>1 should comment on two sections, and so I will address 2 those. One of them is 2.513(J) which is about a jury 3 view, and it's like our present rule, except that 4 it -- well, what it says, "On motion of either party 5 or on its own initiative," then it adds the language 6 "or at the request of the jury, the court may order a 7 jury view."</p> <p>8 I hear a lot of people being scared by this 9 provision that, you know, the jury might be requesting 10 a jury view, but actually I think this doesn't change 11 the present practice.</p> <p>12 Suppose you are in a case and a juror writes 13 a note now and says, Judge, you think we could go out 14 and look at the scene, or they might raise their hand 15 and say, Could we go look at the scene? It's possible 16 right now.</p> <p>17 What's the judge going to say? Well, I can't 18 allow it. Of course the judge, that could be the 19 trigger right now under our present practice, a signal 20 to the judge that maybe it's appropriate for the jury 21 to go out and take a view.</p> <p>22 I think that adding that really doesn't 23 change anything, all it does -- now, see the rule 24 doesn't say you have got to tell them that they may 25 request a view. I would probably not want to do that</p>
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<p>1 Arizona rule, because there is actually an Arizona 2 rule that allows that. It cites the Arizona rule.</p> <p>3 And this also is in the commentary. Recent 4 empirical studies or structured jurors, of structured 5 jurors' discussions on the evidence during actual 6 trials of civil cases found that allowing discussions 7 did not lead to premature judgments in cases by 8 jurors, enhanced juror understanding of the evidence, 9 and in more complex cases served to decrease the 10 incidence of fugitive discussions of the trial by 11 juries with family and co-workers and met with high 12 levels of acceptance by jurors, judges, and trial 13 counsel. See Sherry Diamond, et al, jury discussions 14 during civil trials, 45 Arizona Law Review 1 2003, and 15 there are other citations, and you can find those in 16 the commentary of the principles.</p> <p>17 And that's -- I just wanted to make sure I 18 had a chance to share that with you, and I have a 19 plane to catch at 3:00 to go to Chicago for the ABA 20 officers conference this afternoon.</p> <p>21 JUDGE KENT: Judge Giovan, you also have to 22 leave before we reconvene. Do you have any further 23 comments that you would like call to the attention of 24 the Assembly?</p> <p>25 JUDGE GIOVAN: This morning I was told I</p>	<p>1 In my preliminary instructions, and I don't think my 2 committee on standard civil instructions will add 3 that. They will do it over my dead body, I will tell 4 you that.</p> <p>5 But I would like to point out one other 6 thing. Something came to my attention in here. The 7 present rule says that the only person that can talk 8 at the scene is an officer appointed by the court. 9 That isn't the way it works. I have taken jurors on 10 views a number of times, and in every case the lawyers 11 or a witness will want to say, That's the hole I was 12 talking about or this is where I was standing, and of 13 course the whole purpose of going there is to assist 14 the jury to understand the testimony that was in 15 court.</p> <p>16 Our criminal rule actually provides for that. 17 It says that when you go out to the scene somebody may 18 comment on the scene, and of course a record is made 19 of that, and so one of the groups that I chaired a 20 discussion has recommended that we simply adopt the 21 rule in criminal cases. And I think that's the actual 22 practice in any event.</p> <p>23 Then the only other thing -- oh, the judge 24 commenting on the evidence. Would you believe it's in 25 our rules already? It's actually in MCR 2.516(B)(3).</p>



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<p>1 It says something like the judge may comment on the 2 evidence as justice requires, or something to that 3 effect. 4 I don't think in the history of Michigan any 5 judge has ever commented — used that provision. I 6 have always wondered why it's in there. I suspect 7 it's a holdover from the common law. 8 I was in Old Bailey once, and I heard the 9 judge say, Well, you heard Mr. Jones say this, that, 10 and the other. Such evidence should be received with 11 some skepticism. You know, I think that if the judge 12 did that, it seems to me it would be instant reversal. 13 There is also an inherent contradiction. It 14 says that the judge may — on the proposal — the 15 judge may comment on the weight of the evidence, but 16 it says it also has to be fair and impartial. The 17 judge is either going to make a comment that's 18 influential or not, which has not been our custom, 19 because the jurors are, supposed to be up to the 20 jurors, or it's going to be perfectly impartial. 21 Well, if it's a perfectly impartial summary of the 22 evidence, why do it? You know, we usually leave that 23 to the attorneys. 24 So you might — I think it shouldn't be 25 adopted, and I think we might even recommend that the</p>	<p>1 The practical effect is that we have got two 2 weeks out you have to submit all your deposition 3 summaries, settlement discussions seem to intensify at 4 that point and cases were resolved. 5 JUDGE KENT: Thank you. It's now 11:30, and 6 I suggest perhaps we should suspend this discussion on 7 jury amendments until we deal with the 11:30 schedule 8 and then resume our discussion until lunch. 9 CHAIRPERSON BUIREWEG: That is exactly what 10 we are going to do. Thank you, Judge Kent and 11 panelists. Panelists, if you wouldn't mind staying 12 where you are, I don't know how long the next proposal 13 will take, and we may be able to get back to these 14 issues. 15 I would like to call forward at this time 16 Mr. Timothy O'Sullivan from the Client Protection Fund 17 Standing Committee to introduce the next proposal. I 18 need a motion, however, from the floor to grant floor 19 privileges to the following non-Assembly members: 20 Mr. Fallasha Erwin, Mr. Daniel Dalton, Mr. Joseph 21 Garin, Mr. John VanBolt, Mr. Robert Agadinski, and 22 Ms. Linda Rexer. Is there a motion? 23 JUDGE KENT: Wally Kent, 54th circuit. I so 24 move. 25 VOICE: Support.</p>
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<p>1 Supreme Court take it out of the present rule. 2 MR. DIMOS: If I may, because I may have 3 problems as well, depending on the pace of the 4 deliberations. 5 First of all, I wanted to thank Lori and 6 everyone here at the State Bar of Michigan for 7 allowing myself and my fellow Hoosiers to participate. 8 We hope that we have provided some insight and benefit 9 as to our experience. 10 I did want to comment. I have some thoughts, 11 but one particular one which I think would be unique, 12 and that is the proposal regarding reading of 13 deposition summaries to the jury. 14 While it's not provided for in the Indiana 15 rules, we had a federal judge in the Southern District 16 of Indiana, who sits primarily in Indianapolis, who 17 had this practice for years. Where it works in 18 practice is on evidence, for instance medical 19 testimony, where a treating physician, even 20 investigating police officers at times. It's not 21 going to be for perhaps a key witness, but for 22 witnesses that at one time we would bring in, even if 23 it was to lay evidentiary foundations, this is before 24 the courts were more forceful in getting stipulations 25 out, that kind of summary would work.</p>	<p>1 CHAIRPERSON BUIREWEG: Any discussion? 2 All those in favor. 3 Any opposed. 4 Motion carries. Thank you very much. 5 Mr. O'Sullivan, would you like to come 6 forward and introduce your contingency and your 7 proposal. 8 MR. DALTON: Good morning. My name is 9 Dan Dalton. Mr. O'Sullivan will be speaking as part 10 of the presentation today. 11 I am here on behalf of the Client Protection 12 Fund. We are here to present a proposal that was 13 provided to this Assembly earlier this spring on trust 14 overdraft notification. 15 The drafters of this proposal include a 16 committee from the fund, including Fallasha Erwin, who 17 is the chair of our fund; Roshunda Price from the 18 University of Michigan Legal Clinic, who can't be here 19 today; Joe Garin of Lipson Neilson in Bloomfield 20 Hills; myself from Tomkw Dalton of Royal Oak, a small 21 firm in Royal Oak, Michigan. 22 We also have Linda Rexer, Executive Director 23 of the State Bar Foundation, who has managed the IOLTA 24 since 1990; Rick Winder, the Deputy Director for the 25 State Bar Foundation; John VanBolt, Attorney</p>

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<p>1 states, and most, if not all, of the banks when</p> <p>2 something happens like this, they call the State Bar</p> <p>3 in Michigan anyway to let us know that there is a</p> <p>4 problem and that there is an overdraft.</p> <p>5 It's pretty rare for this to happen, and</p> <p>6 someone has to be very, very desperate to let their</p> <p>7 client trust account go down to something then write a</p> <p>8 bad check on it. But I think that this rule will help</p> <p>9 prevent a bad situation from getting worse and</p> <p>10 preventing attorneys who have a gambling problem, who</p> <p>11 have an alcohol addiction problem or other drug</p> <p>12 problem from getting in the hole even more, and I</p> <p>13 think that this rule is basically putting down on</p> <p>14 paper what's already in place anyway, because the</p> <p>15 banks, the national banks already call the State Bar</p> <p>16 of Michigan or the Attorney Grievance Commission and</p> <p>17 let them know that there is a problem here. I ask</p> <p>18 that the members support this.</p> <p>19 CHAIRPERSON BUITEWEG: Is there further</p> <p>20 discussion?</p> <p>21 It's been moved and seconded that the</p> <p>22 Representative Assembly approve the proposed trust</p> <p>23 account overdraft notification rule, MRPC 1.15(A), and</p> <p>24 authorize the State Bar of Michigan to make any</p> <p>25 subsequent editorial, clerical, or technical language</p>	<p>1 CHAIRPERSON BUITEWEG: We are recessed. Be</p> <p>2 back at 1:30 sharp.</p> <p>3 (Lunch break taken 11:56 a.m. to 2:15 p.m.)</p> <p>4 CHAIRPERSON BUITEWEG: I am going to go ahead</p> <p>5 and reconvene the meeting at this point. I think we</p> <p>6 have a quorum present. As people come back from</p> <p>7 lunch, they can take their seats. I don't want to</p> <p>8 waste any further time.</p> <p>9 As you can see, we lost a few of the</p> <p>10 panelists. Magically we have had replacements appear</p> <p>11 in their stead, and so we are very thankful to Judge</p> <p>12 Hammer from the Michigan District Judges Association</p> <p>13 from Garden City's District Court for joining us. He</p> <p>14 was given floor privileges this morning when we voted</p> <p>15 in our special rules, and Judge Kent has now been</p> <p>16 transferred — I won't say demoted or promoted — from</p> <p>17 moderator to panelist from Tuscola County. I will do</p> <p>18 the best I can with the moderating.</p> <p>19 I would like to go ahead and continue. I</p> <p>20 have been asked if we could continue with cluster (E)</p> <p>21 of the proposed jury reforms, and starting with</p> <p>22 2.513(F), deposition summaries, and 2.513(G),</p> <p>23 scheduled experts.</p> <p>24 In keeping with the special rule, I would</p> <p>25 like to invite Judge Heath from Indiana to comment if</p>
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<p>1 changes to the proposed rule and comments that may</p> <p>2 assist in effecting the intent of the proposal after</p> <p>3 discussion with Michigan financial institutions and</p> <p>4 others and prior to submitting the rule to the</p> <p>5 Michigan Supreme Court.</p> <p>6 All those in favor of this motion please say</p> <p>7 yes.</p> <p>8 Any opposed?</p> <p>9 Any abstentions?</p> <p>10 Motion carries. Thank you very much. Thank</p> <p>11 you for coming today.</p> <p>12 (Applause.)</p> <p>13 CHAIRPERSON BUITEWEG: We do have five</p> <p>14 minutes, and I am not one to squander time given our</p> <p>15 time constraints, but I think everybody probably needs</p> <p>16 a five-minute bathroom break before lunch. I don't</p> <p>17 want anybody to be late from lunch.</p> <p>18 Just one moment. I would like to, if you</p> <p>19 could, just one moment, please, I am sorry. It's come</p> <p>20 to my attention that the chair of our Awards and</p> <p>21 Nominations Committee won't be here this afternoon, so</p> <p>22 I would like to recognize Carl Chioini, thank him for</p> <p>23 his service to the Assembly and have him come forward</p> <p>24 and receive his plaque. Mr. Chioini.</p> <p>25 (Applause.)</p>	<p>1 he has got any experience with these two particular</p> <p>2 court rules. Judge Heath.</p> <p>3 JUDGE HEATH: I will make this one real</p> <p>4 short. No, I don't. I have not done deposition</p> <p>5 summaries, and I have not scheduled experts. We have</p> <p>6 a rule, trial rule for Indiana where if the request</p> <p>7 for separation is made, it must be honored. I have no</p> <p>8 discretion. So separating witnesses would, I assume,</p> <p>9 run afoul of the scheduling of the experts, or could,</p> <p>10 and that would have to be somehow reconciled.</p> <p>11 But just a comment generally, and I think</p> <p>12 scheduling experts could assist in some cases, and I</p> <p>13 could see where that would be helpful in some cases,</p> <p>14 perhaps the discretion might be helpful.</p> <p>15 I certainly personally am opposed. This is</p> <p>16 just me. I am not speaking perhaps on behalf of the</p> <p>17 whole Indiana Bar, but I don't like the idea of</p> <p>18 deposition summaries. I believe that invades the</p> <p>19 province of the fine work that the jury can do. I</p> <p>20 would instruct them to treat depositions and video</p> <p>21 depositions of the witnesses like any other witness.</p> <p>22 So I am not real keen on it, but that's the only</p> <p>23 insight I can give you.</p> <p>24 CHAIRPERSON BUITEWEG: I know that the trial</p> <p>25 lawyers have something to say about this. Terry and</p>

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<p>1 Doug, have you chosen amongst yourselves?</p> <p>2 MR. SHAPIRO: I think we are both going to</p> <p>3 have something to say.</p> <p>4 CHAIRPERSON BUITEWEG: Go ahead.</p> <p>5 MR. MIGLIO: I think it's fair to say that a</p> <p>6 significant amount of time spent as a trial lawyer</p> <p>7 working to elicit testimony, whether it be in a</p> <p>8 de bene esse deposition or a discovery deposition from</p> <p>9 witnesses, so much so that I think —</p> <p>10 VOICE: I am having a hard time hearing you</p> <p>11 in the back.</p> <p>12 MR. MIGLIO: I was saying, a significant</p> <p>13 amount of trial preparation and trial work involves</p> <p>14 preparing to examine witnesses and eliciting what may</p> <p>15 be de bene esse testimony from those witnesses, which</p> <p>16 oftentimes can be interpreted a number of different</p> <p>17 ways by the jury. It's not an uncommon practice to</p> <p>18 have blowups of deposition testimony because you want</p> <p>19 to make a point with the jury about the exact wording</p> <p>20 of a witness' answer that's critical to your case or</p> <p>21 the defense of a case.</p> <p>22 Deposition summaries merely would purport to</p> <p>23 gloss over what the witness has actually testified to.</p> <p>24 I can't imagine in an instance that we are going to</p> <p>25 summarize testimony as opposed to engage in a</p>	<p>1 do a de bene esse dep, now you are already at a</p> <p>2 disadvantage because you have to show a video or read</p> <p>3 a transcript. Now you are going to be at a second</p> <p>4 layer of disadvantage because the other side is</p> <p>5 bringing in a live witness and you are going to be</p> <p>6 reading a summary that the other side has approved.</p> <p>7 It's really — I think this is a very, very</p> <p>8 bad rule, and I would note my understanding is that it</p> <p>9 isn't being used in Indiana, it isn't being used in</p> <p>10 any state anywhere in the country.</p> <p>11 Also, who resolves the disagreements? I say</p> <p>12 this is what the summary should say; defense counsel</p> <p>13 says this is what the summary should say. The judge</p> <p>14 has to make a ruling. There is no rule of evidence</p> <p>15 for him to base his ruling on. He is not saying here</p> <p>16 is the questions that can be asked or not. He is</p> <p>17 saying this is an accurate reading of the deposition</p> <p>18 transcript, and so you are also making the judge be a</p> <p>19 determiner of facts, and she has to read the</p> <p>20 deposition with a level of care that judges are not</p> <p>21 required to do on a routine basis right now to make</p> <p>22 rulings. They get to see the question and the answer</p> <p>23 and say that's a good question, that's a bad answer —</p> <p>24 that's a bad question. Now they are going to be the</p> <p>25 arbiters of what is an accurate description.</p>
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<p>1 stipulation in open court about what somebody would</p> <p>2 say or what fact was agreed upon would, in fact,</p> <p>3 advance the fact finding procedure for the jury.</p> <p>4 And so I cannot see how deposition summaries</p> <p>5 in any way, shape, or form, except those that possibly</p> <p>6 may be stipulated to by counsel to get in the record a</p> <p>7 specific fact or a specific finding, would otherwise</p> <p>8 be appropriate for a jury trial.</p> <p>9 MR. SHAPIRO: I am going to go ahead and talk</p> <p>10 about the deposition summaries and then also comment</p> <p>11 on the expert witness. Can I be heard in the back?</p> <p>12 First on the dep summaries, to amplify just a</p> <p>13 little what Terry had to say, judging the credibility</p> <p>14 of witnesses is pretty central to our system, and the</p> <p>15 notion that somehow in a short, kind of clean summary</p> <p>16 a jury is going to be able to determine how credible</p> <p>17 that witness was in terms of the language that they</p> <p>18 used, the nuances, the pace of cross-examination is</p> <p>19 essentially impossible.</p> <p>20 You are also in a situation where if someone</p> <p>21 wants, under this rule if someone brings in a live</p> <p>22 witness, they get to present that live witness for as</p> <p>23 long as they want and elicit all the testimony they</p> <p>24 want, but if for reasons of convenience or difficulty</p> <p>25 with the expert coming to town or whatever you have to</p>	<p>1 It surely is going to lead to lots and lots</p> <p>2 of appeals. I mean, it's hard to imagine how any time</p> <p>3 you lose with a deposition summary where you didn't</p> <p>4 get what you wanted that you wouldn't raise that as an</p> <p>5 appellate issue.</p> <p>6 I am not quite sure what the upside of this</p> <p>7 proposal is. I mean, I guess I agree with Terry, if</p> <p>8 there is something so fundamental that the parties</p> <p>9 could stipulate in evidence, we don't need this rule</p> <p>10 for that. We could just stipulate that this is the</p> <p>11 amount of money or this is the foundation for this and</p> <p>12 so on.</p> <p>13 Let me turn then to the expert witness. Many</p> <p>14 of you here, I think, do do trial work, and some of</p> <p>15 you probably with multiple experts, and you will know</p> <p>16 what I am talking about. Some of you may not. The</p> <p>17 coordination of experts in a medical malpractice trial</p> <p>18 or even in another type of civil case where you have</p> <p>19 multiple experts is an unbelievably difficult</p> <p>20 logistical headache.</p> <p>21 If you are bringing in a physician from</p> <p>22 Harvard University who has to teach, who has clinical</p> <p>23 responsibilities, who has administrative</p> <p>24 responsibilities, and you want her to come in during</p> <p>25 these three hours of the day, you may be lucky enough</p>

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<p>1 to set that up, or it may be that you can't do it. If</p> <p>2 you want to have experts in a certain order, you may</p> <p>3 be fortunate to set that up, but it's going to take an</p> <p>4 enormous amount of effort.</p> <p>5 This is a job, even though it has nothing</p> <p>6 to do with practicing law, that I do myself in my</p> <p>7 office. I can't have anyone else talking to experts,</p> <p>8 setting up deposition times, because nobody is there</p> <p>9 prepared really to juggle when every doctor says I</p> <p>10 can't come that day, I can't come that day.</p> <p>11 Now, imagine if on top of that I have to</p> <p>12 coordinate with the defense experts to make sure that</p> <p>13 they can come in right after my experts, and then if</p> <p>14 the purpose of this whole thing is to allow</p> <p>15 substantive, discrete areas of the case to be tried at</p> <p>16 one time, then I have to get my expert back for their</p> <p>17 rebuttal, because if they come in after the</p> <p>18 defendant's case, that makes no sense. The idea was</p> <p>19 to put all the evidence together on that issue.</p> <p>20 So now we are looking at having doctors come</p> <p>21 in for at least a day, maybe multiple days, at a cost,</p> <p>22 you know, to take a medical malpractice case to trial</p> <p>23 with several experts, \$50,000 is a pretty base figure,</p> <p>24 and you can get a lot higher than that. Imagine if</p> <p>25 you take those same experts and tell them I need you</p>	<p>1 testify about my client's headaches but not about my</p> <p>2 client's traumatic brain injury. I have got a</p> <p>3 rehabilitation doc later in my case to talk about</p> <p>4 that, but the defendant is using a neurologist on both</p> <p>5 issues. So I have somebody who comes in and testifies</p> <p>6 on headaches. Now his expert, who is supposed to</p> <p>7 testify also about TBI, comes in, traumatic brain</p> <p>8 injury, but it hasn't been raised yet. It's not in</p> <p>9 evidence, he can't talk about it. So does he come</p> <p>10 back a second time, and so on.</p> <p>11 Plaintiffs actually, I hope it wouldn't come</p> <p>12 to this in terms of the rule coming into effect, but I</p> <p>13 am sure that plaintiffs would become pretty conscious</p> <p>14 about introducing their evidence in such a way so as</p> <p>15 to make life difficult for the defense expert who gets</p> <p>16 up in the middle of their case, because under the new</p> <p>17 rules experts can only talk about things that are in</p> <p>18 evidence, so you would be pretty careful about what</p> <p>19 got in evidence before that defense expert got up.</p> <p>20 So I do think it's, in all honesty, it's</p> <p>21 throwing -- oh, and the panel, the idea of having</p> <p>22 these judges sit around and have a panel -- I will be</p> <p>23 brief. I know I have gone on. One, you know, the</p> <p>24 Rules of Evidence are out the window, completely out</p> <p>25 the window. What are you going to say, Here is the</p>
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<p>1 for three days. The practice simply becomes</p> <p>2 impossible, but it will be done, because both sides</p> <p>3 will have to meet each other -- you know, one guy ups</p> <p>4 the ante, then the other has to meet them. We are</p> <p>5 talking about a grossly inefficient system both</p> <p>6 logistically and financially.</p> <p>7 Again, I am not quite sure what the upside</p> <p>8 is. I mean, Terry sits on the defense side, and I</p> <p>9 don't think he disagrees with me, that this is just</p> <p>10 logistically impossible.</p> <p>11 In addition, you know, there is a fundamental</p> <p>12 principle about the side with the burden of proof and</p> <p>13 burden of persuasion going first. That's how it's</p> <p>14 always been done. We don't present evidence during</p> <p>15 the other side's case, and that's a real principle.</p> <p>16 It's not just, you know, kind of a practical solution.</p> <p>17 That's how we present evidence. If you have got to</p> <p>18 prove the case, you go first. Person who wants to</p> <p>19 disprove the case goes second.</p> <p>20 Say for prosecutors, I mean I doubt -- there</p> <p>21 is no prosecutor on this panel, but I can't imagine</p> <p>22 they would want defense experts in the middle of their</p> <p>23 cases when they are seeking a conviction.</p> <p>24 Also, evidentiary problems. What if my</p> <p>25 expert, I have a neurologist, and he is going to</p>	<p>1 list of things you can't say, Doc.</p> <p>2 The idea that you are going to have a neutral</p> <p>3 doctor or neutral expert be the officiating person,</p> <p>4 doctors did not want to sit on medical malpractice</p> <p>5 case evaluation panels. They don't have the time to</p> <p>6 do that sort of thing, and to find a neutral one would</p> <p>7 be difficult. I mean, I have never had a doctor from</p> <p>8 Michigan testify in favor of a plaintiff. I am not</p> <p>9 sure where we are going to find those neutral doctors</p> <p>10 to host these panels.</p> <p>11 I guess I have said enough. I think the rule</p> <p>12 is a very, very poor rule. It has no precedent in any</p> <p>13 state. I don't know where it came from, and I think</p> <p>14 it should be voted down in total.</p> <p>15 JUDGE KENT: Lori, may I?</p> <p>16 CHAIRPERSON BUTTEWEG: Yes, you may.</p> <p>17 JUDGE KENT: The only other thing that I</p> <p>18 would suggest in terms of scheduling of experts is</p> <p>19 that I think a mechanism already exists. It's not</p> <p>20 unheard of for counsel to come to me for one reason or</p> <p>21 another to ask to schedule a witness of any</p> <p>22 description out of order due to scheduling reasons,</p> <p>23 and we have a fairly collegial Bar in a small</p> <p>24 community such as ours, but it's not at all unusual,</p> <p>25 given the right set of circumstances, that counsel</p>

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<p>1 will stipulate to taking witnesses out of order if the 2 circumstances exist which would justify it, and I 3 respect the comments of the two speakers before me. 4 It would be very rare times when it should be done, 5 but if the circumstances exist, we can already do it. 6 CHAIRPERSON BUITEWEG: With that, 7 Mr. Rombach, do you want to go ahead and move for 8 2.513(F) so we can start the debate from the Assembly. 9 MR. ROMBACH: Yes, for purposes of the 10 discussion, I would propose that the Assembly adopt 11 2.513(F). That's going to be discussed on page eight 12 of the packet, and it will be on the yellow sheets on 13 page five. Deposition summaries. Where it appears 14 likely that the contents of the deposition will be 15 read to the jury, the court should encourage the 16 parties to prepare concise, written summaries of 17 depositions for reading at trial in lieu of the full 18 deposition. Where a summary is prepared, the opposing 19 party shall have the opportunity to object to its 20 contents. Copies of the summaries should be provided 21 to the jurors before they are read. 22 Before I seek support, I would like to 23 mention I did have some discussions at lunch with 24 representatives from the Supreme Court. They were 25 monitoring our debate this morning, and the parts that</p>	<p>1 expert and wasted time asking irrelevant questions 2 like how their family is doing? What are you going to 3 summarize? You are asking a question about their 4 background. Their background is very important to 5 establish how important their testimony is and how it 6 should be weighed by a jury. That is no an irrelevant 7 issue. You can't summarize that. 8 Then you start asking about how they treated 9 this person and what they found. That is not 10 irrelevant. It can't be summarized. What are the 11 potential issues for the patient down the road? How 12 are you going to summarize that? Deposition summaries 13 make no sense whatsoever. 14 As far as the scheduling of experts, let's 15 talk about any injury case, because if you are dealing 16 with a doctor who is treating patients that are 17 injured in one way, shape, or form all the time, they 18 are going to spend their -- 19 CHAIRPERSON BUITEWEG: You can save your 20 comments for (G). We just have (F) in front of us. 21 You can save your comment for (G). 22 Any other comments for discussion, questions? 23 It's been moved and seconded that we adopt 24 2.513(F), the language that Mr. Rombach read into the 25 record, which is on page five of your yellow sheet. I</p>
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<p>1 they liked the most were the insightful commentary, 2 particularly, for instance, how indigency affected the 3 rules, and the parts that they disliked, as a lot of 4 other Assembly members have voiced over lunch to me in 5 particular, is the parts of the technical amendments 6 on the wording. So perhaps we would be most useful as 7 a resource if we were to confine most of our comments 8 to the principles underlying these as we have had in 9 the past with the Rules of Professional 10 Responsibility. 11 So I seek in that light a second for this 12 proposal. 13 CHAIRPERSON BUITEWEG: Is there a second so 14 we can start discussions? 15 VOICE: Support. 16 CHAIRPERSON BUITEWEG: And discussion, 17 Mr. Miller. 18 MR. MILLER: Randall Miller, 6th circuit. 19 Let me start by keeping this short. I don't know if 20 the mike is working, but I am loud enough anyway. 21 To keep this short, I want to completely 22 mirror what Doug and Terry said, and I am just going 23 to add a few comments on top of that. 24 With regard to deposition summaries, has 25 anybody in this room ever taken the deposition of an</p>	<p>1 am not going to read it again in the interest of time 2 since he just read it and there are no amendments or 3 anything like that. 4 So everybody in favor say yes. 5 All opposed say no. 6 Motion falls. I will have the record reflect 7 that that was unanimous. Thank you, Judge Stephens, 8 for reminding me. 9 2.513(G), scheduling of expert testimony. 10 MR. ROMBACH: To facilitate Mr. Miller's 11 discussion on the next topic, I would like to propose 12 for discussion 2.513(G), scheduling expert testimony. 13 The court may, in its discretion, craft a procedure 14 for the presentation of all expert testimony to assist 15 the jurors in performing their duties. Such 16 procedures may include, but are not limited to: 17 (1) scheduling the presentation of a party's 18 expert witnesses sequentially; or 19 (2) allowing the opposing experts to be 20 present during the other's testimony and to aid 21 counsel in formulating questions be asked of the 22 testifying expert on cross-examination; or 23 (3) providing for a panel discussion by all 24 experts on a subject after or in lieu of testifying. 25 The panel discussion, moderated by a neutral expert or</p>

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<p>1 the trial judge, would allow the experts to question</p> <p>2 each other.</p> <p>3 I would move for adoption theoretically and</p> <p>4 ask for your support.</p> <p>5 VOICE: Support.</p> <p>6 CHAIRPERSON BUITEWEG: All right. It's been</p> <p>7 moved and seconded to adopt 2.513(G). Are there any</p> <p>8 comments, Mr. Miller?</p> <p>9 MR. MILLER: Thank you, Madam Chair, and once</p> <p>10 again, I adopt the comments of both Terry and Doug,</p> <p>11 try to keep this short, and based on the resounding</p> <p>12 statement made by this committee a moment ago, in fact</p> <p>13 it was really short, but just point this out, just in</p> <p>14 case anybody is waffling.</p> <p>15 Some doctors treat a lot of people who are</p> <p>16 involved in an accident in one way, shape, or form.</p> <p>17 Under this rule you are going to force them into</p> <p>18 courtrooms when they don't have time to go. Their</p> <p>19 entire job would be testifying, theoretically, or</p> <p>20 waiting out in the hallway to testify. And under our</p> <p>21 rules to qualify an expert, they may no longer qualify</p> <p>22 as an expert because they have spent the last year</p> <p>23 sitting in courtrooms. This is absolutely</p> <p>24 preposterous. Therefore, I move to strike it down</p> <p>25 like last time.</p>	<p>1 perspective, I couldn't imagine doing it.</p> <p>2 I have less qualms about attorneys making</p> <p>3 those statements, because I think the adversarial</p> <p>4 process might take care of any potential problems</p> <p>5 there, but I would not want that function as a judge.</p> <p>6 CHAIRPERSON BUITEWEG: Judge Kent.</p> <p>7 JUDGE KENT: I totally agree with</p> <p>8 Judge Heath. In my bio I mentioned I do some</p> <p>9 community theater. I have to discipline myself in the</p> <p>10 course of giving instructions and so forth not to tip</p> <p>11 my hand as to what I feel the merits of the case may</p> <p>12 be. I am sincere when I say that. I catch myself</p> <p>13 sometimes stating something with certain emphasis that</p> <p>14 would suggest favoring or disfavoring one side or the</p> <p>15 other.</p> <p>16 That's bad enough, but if I were to comment,</p> <p>17 I am sorry, what I say would be taken as gospel. I</p> <p>18 don't want to be the 13th juror or I don't want to be</p> <p>19 the super juror. That is not my role in the jury</p> <p>20 case, nor should it become that role. It is up to the</p> <p>21 jury to make the decision. It is up to the litigators</p> <p>22 to make the comments on the evidence and let the chips</p> <p>23 fall where they may.</p> <p>24 CHAIRPERSON BUITEWEG: Judge Hammer.</p> <p>25 JUDGE HAMMER: We have always had the</p>
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<p>1 VOICE: Call the question.</p> <p>2 CHAIRPERSON BUITEWEG: The question has been</p> <p>3 called. All those favor of adopting 2.513(G),</p> <p>4 scheduling expert testimony, say yes.</p> <p>5 All those opposed say no.</p> <p>6 Any abstentions?</p> <p>7 The motion falls unanimously.</p> <p>8 We will now move on to the next cluster that</p> <p>9 I have been asked to deal with in this order is</p> <p>10 2.513(M), comment by the judge. This is not really a</p> <p>11 cluster. It's all by itself. Let me direct the</p> <p>12 commentary regarding this proposal, 2.513(M), comment</p> <p>13 by the judge, to the panel, and I have lost my sheet</p> <p>14 as to who volunteered, so if you could just talk about</p> <p>15 it. Judge Heath, do you have anything on this one?</p> <p>16 JUDGE HEATH: Yes. I looked over your</p> <p>17 proposed rule, and I must say that I would not want</p> <p>18 the responsibility of making such comment. I would</p> <p>19 not do so unless the comment itself was stipulated to</p> <p>20 by the attorneys, opposing counsel.</p> <p>21 Again, I don't believe we have a rule that</p> <p>22 covers this, so I am just speaking on my own behalf</p> <p>23 here, but I don't think it's appropriate. I think it,</p> <p>24 again, invades the province of the jury to do its</p> <p>25 fact-finding function, so I would, at least from my</p>	<p>1 authority to do this, but I have never done it. I</p> <p>2 have never seen it done. The only thing I can bring</p> <p>3 to the table in terms of discussion, I handled a</p> <p>4 matter where I bound over to circuit court for trial.</p> <p>5 As a district judge, I handle the preliminary</p> <p>6 examination, and, quite frankly, when I heard the</p> <p>7 verdict I was rather stunned at it. I mentioned it to</p> <p>8 the newspaper reporter at the trial, and then she went</p> <p>9 on telling me how the judge had commented on the</p> <p>10 witnesses and their credibility, and it was sort of an</p> <p>11 insight as to how that may have affected the outcome.</p> <p>12 Like I say, I was stunned at the verdict</p> <p>13 based upon the information I knew from looking at the</p> <p>14 investigation reports, hearing the preliminary exam,</p> <p>15 and I have to believe that had something to do with</p> <p>16 it.</p> <p>17 Whether it was fair or not, whether the</p> <p>18 result was right or not, I don't know. But that's the</p> <p>19 only time I have heard of it being done in recent</p> <p>20 history, in my present experience, but, like I say, it</p> <p>21 did seem to affect the outcome in a way that from the</p> <p>22 distance that I viewed it didn't seem quite fair, but,</p> <p>23 having said that, that's the only really insight I can</p> <p>24 give you from my personal experience on this rule.</p> <p>25 Like I said, we have had the authority. I</p>

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<p>1 would not want to use it. I have never used it, and I</p> <p>2 think it should be used very sparingly under very</p> <p>3 limited circumstances.</p> <p>4 CHAIRPERSON BUITEWEG: Mr. Rombach, would you</p> <p>5 move for the adoption of this 2.513(M), please.</p> <p>6 MR. ROMBACH: At the risk of submitting</p> <p>7 another dead letter, I will propose 2.513(M), comment</p> <p>8 on the evidence. After the close of the evidence and</p> <p>9 arguments of counsel, the court may fairly and</p> <p>10 impartially sum up the evidence and comment to the</p> <p>11 jury about the weight of the evidence, if it also</p> <p>12 instructs the jury that it is to determine for itself</p> <p>13 the weight of the evidence and the credit to be given</p> <p>14 to the witnesses and that jurors are not bound by the</p> <p>15 court's summation or comment. The court shall not</p> <p>16 comment on the credibility of witnesses or state a</p> <p>17 conclusion on the ultimate issue of fact before the</p> <p>18 jury. And I seek support for the purpose of our</p> <p>19 discussion.</p> <p>20 VOICE: Support.</p> <p>21 CHAIRPERSON BUITEWEG: Is there a second?</p> <p>22 Okay. I heard a second. Any discussion?</p> <p>23 All those in favor of 2.513(M) say yes.</p> <p>24 There was discussion. I am so sorry.</p> <p>25 MR. HERRINGTON: David Herrington, 52nd</p>	<p>1 and, therefore, the judges have chosen not to exercise</p> <p>2 this, but that's, again, why it's being presented in</p> <p>3 this package of materials.</p> <p>4 CHAIRPERSON BUITEWEG: With that, is there a</p> <p>5 motion to withdraw?</p> <p>6 MR. HERRINGTON: Actually it's not. I still</p> <p>7 don't understand.</p> <p>8 CHAIRPERSON BUITEWEG: I am sorry, you are</p> <p>9 out of order. I am going to have to take a vote on</p> <p>10 the motion on the floor.</p> <p>11 MR. HERRINGTON: Understood.</p> <p>12 CHAIRPERSON BUITEWEG: If you want to make a</p> <p>13 motion after.</p> <p>14 All those in favor of 2.513(M) say yes.</p> <p>15 All those opposed say no.</p> <p>16 Any abstentions?</p> <p>17 The motion unanimously fails.</p> <p>18 MR. HERRINGTON: Well, I would like to repeat</p> <p>19 my earlier motion.</p> <p>20 VOICE: Point of order, Madam Chairman.</p> <p>21 MR. HERRINGTON: Can you hear me? I would</p> <p>22 like to move that the Representative Assembly, through</p> <p>23 the Chairperson, request that the Supreme Court of</p> <p>24 Michigan provide the Representative Assembly with</p> <p>25 information regarding the genesis, background, and</p>
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<p>1 circuit. I don't know if my motion is proper, but</p> <p>2 because there has been no information provided as to</p> <p>3 the genesis of this proposal or the last proposal and</p> <p>4 the Supreme Court is interested in our insightful</p> <p>5 discussions, I am wondering if it would be proper to</p> <p>6 request that the Supreme Court or the drafters provide</p> <p>7 the Representative Assembly with where these proposals</p> <p>8 came from and why we are being presented with them,</p> <p>9 because I am not aware of any ABA study or any</p> <p>10 empirical studies or studies or evidence or anything</p> <p>11 that would cause these to be drafted. So my motion is</p> <p>12 to request the Supreme Court of Michigan through the</p> <p>13 chair of the Representative Assembly provide us with</p> <p>14 information as to why we are looking at this issue.</p> <p>15 CHAIRPERSON BUITEWEG: That is out of order</p> <p>16 just because there is a motion on the table right now.</p> <p>17 We can vote on this motion and then you can —</p> <p>18 Mr. Rombach would like to answer the question.</p> <p>19 MR. ROMBACH: We have had discussion on where</p> <p>20 this came from. Unbeknownst to me and perhaps others,</p> <p>21 there is actually a Court Rule that allowed this</p> <p>22 emanating from a criminal statute, so the judges do</p> <p>23 have some latitude already, and this would just</p> <p>24 aggrandize that, but no one could provide any</p> <p>25 anecdotal evidence of this going through successfully,</p>	<p>1 beginnings or other information regarding this</p> <p>2 proposal, why we are reviewing it.</p> <p>3 CHAIRPERSON BUITEWEG: Is there a second to</p> <p>4 the motion?</p> <p>5 VOICE: Support.</p> <p>6 CHAIRPERSON BUITEWEG: I hear support. Is</p> <p>7 there discussion?</p> <p>8 MR. ROMBACH: If I may, Tom Rombach, 16th</p> <p>9 circuit. I believe that the court has directed us to</p> <p>10 follow a rather strict time line; that public comment</p> <p>11 is going to close for November 1st, and we are not</p> <p>12 going to be able to even provide any discussion or</p> <p>13 feedback on any direction the Supreme Court may offer</p> <p>14 to us at this time. Oftentimes by the time an</p> <p>15 administrative hearing would be scheduled in January,</p> <p>16 that it would not be possible then for us to provide</p> <p>17 meaningful input, and oftentimes the court has already</p> <p>18 had internal discussions. So at that point I would be</p> <p>19 very strong in my opposition for asking for any</p> <p>20 further material. I believe the Assembly has spoken</p> <p>21 unanimously in opposition to this initiative, and,</p> <p>22 therefore, we should let our votes stand as they are.</p> <p>23 VICE CHAIR HAROUTUNIAN: Ms. Buiteweg.</p> <p>24 CHAIRPERSON BUITEWEG: Lori Buiteweg, 22nd</p> <p>25 circuit. I rise in opposition to the motion, and the</p>

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<p>1 reason is because we heard from Justice Markman this 2 morning that the genesis of these proposals are from 3 many different sources and that the Supreme Court is 4 not necessarily in favor of all of them, that they are 5 looking for feedback and discussion from us, and I 6 feel that it's irrelevant where the proposal came 7 from. What we are charged with doing is letting the 8 Supreme Court know what we think about them, and I 9 don't think finding out where it came from makes any 10 difference. 11 Good job, Ed. 12 All those in favor of the motion say yes. 13 All those opposed say no. 14 Any abstentions? 15 Motion fails. 16 I am going to proceed in order at this point 17 with the 2.513(J) the cluster of proposals affecting 18 juror participation. Judge Heath from Indiana has 19 experience with a number of these: The jury view, the 20 questions from the jurors, note taking by the jurors, 21 and discussing the case before it goes to deliberation 22 amongst the jurors. So I am really grateful that he 23 has stayed this afternoon to discuss these particular 24 proposals with us. 25 Judge Heath, I am going to turn it over to</p>	<p>1 I had some misgivings about it. I thought questions 2 would arise from the jury that would be awkward for 3 us. For example, it would be questions about 4 insurance and so forth, and so I had my reservations 5 about it. But, nonetheless, that particular one was 6 passed, and we now do that in Indiana. 7 I will share with you that I have been 8 pleasantly surprised by the jury questions. I have 9 conducted I guess probably around 15 trials, jury 10 trials, with jury questions involved now. And what I 11 have found is that it really raises the jurors' 12 attention to the trial as a very good benefit. No 13 longer do I see jurors falling asleep. They have got 14 their note pads, they have got their question forms 15 with them, and we control it I think pretty carefully. 16 In the preliminary instructions we advise 17 them as to the methodology for asking questions. It 18 occurs after the lawyers are done. They write out the 19 question. They are directed to give it to the 20 bailiff. I have the bailiff bring it to me. I review 21 it carefully. I call counsel to the bench. We look 22 over the question, and in a good many of the cases the 23 questions are insightful. 24 I have had, I can't tell you how many 25 accident cases I have had where the attorneys would</p>
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<p>1 you. 2 JUDGE HEATH: I thank you very much, Lori. I 3 will share with you that when I first took the bench 4 and conducted jury trials almost ten years ago, this 5 is what it was like. I read the instructions to the 6 jurors. They never saw the instructions. I didn't 7 let them take notes. They didn't take the exhibits 8 back to the jury room and so forth, and that's what my 9 mentor, a very good judge, taught me, and he gave me 10 the reasons. At the time I followed that. And I 11 would submit to you that they were still good jury 12 trials. I don't regret any of those trials. 13 But along about the second or third year and 14 going to conferences and talking to other judges and 15 so forth, I began to think that perhaps it's time to 16 move along a bit in some ways that accommodate the 17 jury, and so I began to allow, I think about my second 18 or third year, jury note taking. In fact, the bailiff 19 was instructed to supply the jurors with note pads and 20 pencils. I began to project at least on some kind of 21 screen or something the jury instructions so they 22 could read along with me, and ultimately I started 23 giving them the instructions. 24 Along came some more reforms, and one of them 25 was jury questions, and I had not been doing that, and</p>	<p>1 forget to ask whether or not, for example, the airbag 2 deployed. The jurors always ask that. I instruct 3 them in my preliminary instructions that insurance is 4 not to be considered, and so they don't ask that 5 awkward question. 6 So the questions that I get are good. They 7 are insightful, and the process we use has been 8 successful, and it's elevated the amount of juror 9 participation, so I have been very pleasantly 10 surprised at the insightful questions, the increased 11 participation on behalf of the jurors. They feel a 12 sense of ownership in the trial. When you talk to 13 them later after the trial, I ask them did you 14 appreciate the chance to take notes and ask questions 15 and so forth, and they invariably say yes. So I 16 think, although I had reservations about the jury 17 questions, I appreciated those. 18 Was another the note taking? Note taking, I 19 have been doing that now for almost nine years, and I 20 can't imagine not giving jurors the chance to take 21 notes. I know lawyers tell me they watch for what 22 notes the jurors are taking. 23 Well, you know, if they don't have the note 24 pads, they are going to make that mental impression 25 anyway. Does it get in their way? Well, we have</p>



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<p>1 preliminary Instructions again that deal with what we 2 tell our jurors. Let me read just part of one to you. 3 Here is my patterned Instruction 1.01. 4 You may take notes during the trial if you 5 wish. Do not become so involved in note taking that 6 you fail carefully to listen to the evidence or 7 observe the witnesses as they testify. 8 Notes are not evidence in the case and must 9 not take precedence over your independent recollection 10 of the evidence. They are only an aid to recollection 11 and are not entitled to any greater weight than your 12 recollection or impression as to the actual evidence. 13 Your notes should not be disclosed to anyone 14 other than a fellow juror during deliberations. Do 15 not take your notes outside the courtroom or the jury 16 room. The court will furnish you with paper and 17 pencil. Later on I tell them I am going to collect 18 their notes and no one is going to see them. That's 19 in my final Instructions. 20 So I think the instruction aids greatly, and 21 the note taking, I have never seen a juror just take 22 notes hour after hour. They don't do that. They will 23 watch things. They will take notes on exhibits that 24 they get. They will be sitting there with an exhibit 25 from the trial notebook. They will see something</p>	<p>1 shorter trials. They seem to appreciate the ability 2 to discuss things under controlled circumstances, and 3 we do control it as much as we can. Let me read you 4 the part of our patterned instruction that deals with 5 jurors discussing things, and here it is. This is 6 just part of our first instruction to them. 7 When you are in the jury room, you may 8 discuss the evidence with your fellow jurors only when 9 all of you are present, so long as you reserve 10 judgment about the outcome of the case until 11 deliberations begin. When you are not in the jury 12 room you must discuss the case -- I am sorry. When 13 you are not in the jury room you must not discuss the 14 case among yourself or with anyone else. And in each 15 admonition I give them before recess, I discuss that 16 with them again. I read that same admonition to them, 17 along with other things. 18 So it's kind of a drumbeat construction 19 throughout the trial. You can discuss it if you are 20 all present, but keep an open mind. That's the 21 drumbeat that gets to them. 22 So I think in short trials I didn't find that 23 clique process going on that Mr. Bell had, but I 24 wanted to pass that on to you in fairness, because 25 there could be that concern. In talking to my jurors</p>
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<p>1 interesting. There will be a note they take. Or they 2 will go for an hour without taking any notes, then 3 suddenly some witness will say something interesting 4 that interests them and they take a note. So I don't 5 find it getting in the way of them listening to 6 witnesses. I think it has worked out fairly well. 7 What's another one? 8 CHAIRPERSON BUI TEWEG: Discussion prior to 9 deliberations. 10 JUDGE HEATH: I was asked by Attorney Bell 11 from Indiana to pass this along to you, and it's 12 interesting. He just conducted, as you know from his 13 earlier meeting this morning with you that he had a 14 lengthy criminal trial, and in talking to some of the 15 jurors post trial he has learned that during the 16 course of that process, of that trial process where 17 they were able to discuss, that cliques were formed 18 and made it difficult for the state's case, he feels, 19 because of the cliques that were formed by virtue of 20 their ability to discuss the case. So he has great 21 reservations and apparently with good reason. 22 Now I will share my situation with you. I 23 have only had one two-week trial. Most of my trials 24 are shorter than a week, the vast preponderance of 25 them. I haven't found that to be the case in the</p>	<p>1 afterwards, they do appreciate the ability to talk 2 about it. 3 The rule is a recognition of the fact that 4 your jurors are discussing the case whether you like 5 it or not and whether instructed to or not. Usually 6 if they are not sequestered they go off to lunch in 7 twos or threes here and there. They are going to 8 discuss some aspect of the case. 9 Now, some juror might say, Don't do that, we 10 can't do that, you know, and you might be successful 11 in stopping them, but I think more it's the 12 recognition that there is discussion going on. And so 13 we are trying to control it rather than let it go on 14 without some controls, and I think by and large it's 15 successful, but there is the danger pointed out by 16 Mr. Bell. 17 CHAIRPERSON BUI TEWEG: The last one is jury 18 view. 19 JUDGE HEATH: I have never taken or had a 20 jury go out on a jury view. I think the ability to do 21 so, the discretion by a court to be able to do so 22 would be important. I have been out on views myself 23 as requested by attorneys in a bench trial, and I 24 think I can see where it can be very important. 25 Our rule does not allow the attorneys to</p>

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<p>1 discuss the matter with -- they can accompany the 2 jury, the jury can view, but they cannot make 3 discussion whatsoever with the jury during that view. 4 There was someone else here this morning talking 5 about, well, of course attorneys point things out 6 about the view, jurors have questions. Our rule does 7 not permit that.</p> <p>8 CHAIRPERSON BUITEWEG: And I know that the 9 trial lawyers wanted to comment in particular on the 10 issue of jurors asking questions of the witnesses, so 11 if you would pass the mike down to them.</p> <p>12 MR. SHAPIRO: I have spoken to a lot of 13 lawyers on both sides about these four particular 14 proposals, because I thought that these were the ones 15 that really went to the heart of the notion of jury 16 reform or empowering the jury, and I have heard 17 differing opinions certainly on the issue of 18 discussion and somewhat on questions. I would say 19 that overall, although, of course, always the devil is 20 in the details, the lawyers that I work with and the 21 organization that I am here to speak for in terms of 22 our preliminary views, no final views have been 23 reached yet, is that on balance all of these are 24 designed to empower and engage the jury and that 25 that's the heart of this proposal and that that's a</p>	<p>1 both of the attorneys. But I think they have handled 2 it appropriately, and I already think that there is an 3 acceptance of that particular procedure.</p> <p>4 Jury view, I do not practice necessarily 5 personal injury. Usually a jury view involves a visit 6 to a plant, a visit to an office site, and I agree 7 with what Judge Glovan was saying earlier is it's 8 absolutely impossible to take a jury to a setting like 9 that and prohibit statements or any communication with 10 the jury about what they are doing there and what they 11 are seeing.</p> <p>12 With respect to note taking, again, it's been 13 pretty prominent, especially in federal court trials I 14 have had. The one thing that I am adamantly opposed 15 to and have significant problems with is allowing the 16 jury to begin deliberations before they are actually 17 instructed and before deliberations are to occur.</p> <p>18 We all know that it goes on. The problem is 19 if you are on the defense side, whether it is a civil 20 or criminal trial, one of the things that you strive 21 and try and make a point of during your opening 22 statement and throughout the case is that the jury is 23 going to keep an open mind until they have heard all 24 of the evidence. And if jurors are allowed to 25 deliberate before that, I feel, even though they do</p>
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<p>1 good thing.</p> <p>2 I can say from personal experience that the 3 degree -- of course, when we do mock trials before 4 cases, before actual trials, they are much shorter, 5 and that's part of the formula for keeping people 6 engaged, but we always allow note taking, questioning, 7 and discussion at various points during our mock 8 trials, and what we find there is that we are much, 9 much better informed lawyers about what's important in 10 the case to these people who are going to be deciding 11 it than we are when they are a black box.</p> <p>12 And I did mention to Terry that I recently 13 lost a case where the jurors found something that they 14 were concerned about in the medical records that no 15 one had addressed. And at that point of course it was 16 too late to address it. They found it in the jury 17 room. I would much have preferred that they 18 challenged me on this item that they thought was 19 detrimental to my case than finding out only through 20 the verdict. So I think these are good and helpful 21 proposals on getting the juries more involved.</p> <p>22 CHAIRPERSON BUITEWEG: Terry.</p> <p>23 MR. MIGLIO: I think most of the judges that 24 I have had trials with in the last five to seven years 25 have allowed jury questions over objections of one or</p>	<p>1 that, but you don't necessarily make a law breaker a 2 model citizen, even though they do that, the constant 3 focus on keeping an open mind is distracted from the 4 ability to talk about it and form opinions with your 5 co-jurors beforehand.</p> <p>6 The other problem that I see with that is in 7 the instance, a lot of cases that I tried that are 8 two, three, four, five weeks long, you have jurors who 9 actually don't participate in jury deliberations 10 because they may be let go as alternates or excess 11 jurors, so you have people that may be controlling the 12 flow of the discussion, asking questions, who never 13 sit on the jury and never are a part of rendering a 14 verdict but yet who may play a role in forming those 15 opinions, and I think as much as it is possible to 16 control it, although it seems to be impossible, the 17 system that we should be describing for jurors is to 18 keep an open mind and to wait until all the evidence 19 is in before you begin to deliberate.</p> <p>20 CHAIRPERSON BUITEWEG: Judge Hammer, I saw 21 your hand up.</p> <p>22 JUDGE HAMMER: Just a couple observations. 23 First, with respect to jury questions, I have 24 traditionally allowed jury questions. We have the 25 authority to do it. There is a standard jury question</p>

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1 for it, and, quite frankly, it always worked well for  
2 me. They would write the question down. Typically I  
3 would rephrase it but ask it in substance, unless I  
4 couldn't. A lot of questions had to do with either  
5 insurance or prior convictions in a criminal case,  
6 such as drunk driving. I see it worked well with one  
7 exception. I traditionally would ask, well, whose  
8 question is this? Am I phrasing it correctly?  
9 Invariably the response would be, Well, all of ours.  
10 We were discussing it. You know, typically we got the  
11 questions after they had a break, and they discussed  
12 it either at lunch or during the break.  
13 So for that reason and that reason alone I  
14 don't do it anymore because I feel like I am telling  
15 them they can't discuss it but then inviting them to  
16 discuss it and setting myself up for possibly a  
17 mistrial, but except for that aspect of it I thought  
18 the procedure of jury questions always worked well.  
19 If we change our philosophy and allow jury  
20 discussions, that takes care of that objection, but I  
21 found in practice, except for that problem, it worked  
22 pretty well. There weren't that many questions, and  
23 usually the questions were pretty good and jurors  
24 understood when I told them, I understand your  
25 question may be a good question, but for evidentiary

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1 reasons I can't ask it, and they always accepted that  
2 explanation, and I spoke with them afterwards, they  
3 always understood why, and I explained that to them.  
4 With respect to jury views, I have done it a  
5 handful of times. It's always worked well. I have  
6 said no a number of times. Afterwards I spoke with  
7 the jurors, and they would agree it wouldn't have  
8 helped at all anyway. The only change in this rule is  
9 to allow the jurors rather than just the parties to  
10 request a view. I don't see any problem with that.  
11 We are just treating jurors as adults. They  
12 understand when you say no. All you just need is the  
13 ability and guts to say no, I don't think it's a good  
14 idea. If I think it's a good idea, then we will do  
15 it. The only change in this rule is to allow the  
16 jurors rather than the parties to request it. In  
17 those cases where it might be helpful, I have found it  
18 works well, and I have never had a problem with the  
19 court officer enforcing my rule that attorneys aren't  
20 to discuss it with the jurors.  
21 CHAIRPERSON BUITEWEG: Judge Kent, do you  
22 have anything on this?  
23 JUDGE KENT: Only on the question of jury  
24 discussion. I would agree with the other comments  
25 about the other issues. I agree with the comments, I

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1 believe it was Terry and Mr. Bell made about the  
2 concern of prejudging a case before all of the  
3 evidence is in and before the instructions have been  
4 provided to the jury which give them the structure  
5 whereby they are to continue their discussions.  
6 I acknowledge and I have had comments from  
7 both Judge Caprathe and from Judge Giovan, instances  
8 where they have discovered that such discussions were  
9 taking place. I don't doubt it. There are holes in  
10 the dike. Rather than tearing down the dike and  
11 letting the flood in, we should continue to plug the  
12 holes as we can.  
13 I am reminded when I was growing up and then  
14 later when I was raising my kids the standard comment  
15 was just because everyone else is doing it is no  
16 reason to let you do it, it's not right. And that's  
17 the way I feel about jury discussions during the  
18 course of the trial.  
19 CHAIRPERSON BUITEWEG: Mr. Rombach, if you  
20 could move the for the adoption of 2.513(J), the jury  
21 view, so we can get this discussion started, that  
22 would be great.  
23 MR. ROMBACH: Again, we are going to break  
24 this down into all four proposals, so if you have  
25 comments try to direct them to the proposal on the

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1 floor.  
2 This first is going to be 2.513(J), jury  
3 view. On motion by the party, on its own initiative,  
4 or at request to the jury, the court may order a jury  
5 view of property or of a place where a material event  
6 occurred. The parties are entitled to be present at  
7 the jury view. During the view no person other than  
8 an officer designated by the court may speak to the  
9 jury concerning the subject connected with the trial.  
10 Any such communication must be recorded in some  
11 fashion. I move for adoption of this proposal.  
12 VOICE: Support.  
13 CHAIRPERSON BUITEWEG: I hear a second on  
14 that. Is there discussion?  
15 MR. GREEN: Good afternoon. I am Robert  
16 Green from the 3rd circuit. I have no objection to  
17 the proposal except as it relates to the prohibition  
18 of allowing someone to speak. I can recall that I had  
19 a case many years ago in which the court did allow us  
20 to actually go to the scene, and I think that the  
21 rule, the whole purpose for the rule is to help us  
22 help the jury to expand their understanding of the  
23 factual situation, and in that situation the court  
24 allowed the witness to testify as to the jury scene,  
25 to the scene of the incident and how it impacted on

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1 the case.

2 If you restrict a witness from testifying  
3 about the scene and its importance to the case, then  
4 it kind of defeats the whole purpose of the rule. So  
5 I have no objection to the rule except for the part  
6 that prohibits the witness from testifying and  
7 expanding on the importance of the jury scene, I am  
8 sorry, the jury view. Thank you.

9 CHAIRPERSON BUITEWEG: Okay. Further  
10 discussion?

11 MR. CHADWICK: Thomas Chadwick from the 8th  
12 circuit. I would make a motion to sever this  
13 proposal. The first half beginning with the words  
14 "jury view," the second half beginning with the words  
15 "during the view." The reason for that proposal is so  
16 that we can vote on the motion regarding jury view  
17 separately from the issue of communication.

18 CHAIRPERSON BUITEWEG: Is there a second to  
19 that motion?

20 VOICE: Support.

21 CHAIRPERSON BUITEWEG: I have heard a motion  
22 and a second. Is there discussion on that motion?

23 All those in favor of the motion say yes.

24 JUDGE KENT: A comment on that. To sever --  
25 if we are going to allow jury discussion at the view,

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1 how are we going to maintain a transcript of what is  
2 being said?

3 CHAIRPERSON BUITEWEG: Okay. This is just a  
4 motion to sever.

5 JUDGE KENT: I am sorry. I beg your pardon.

6 CHAIRPERSON BUITEWEG: All those in favor of  
7 the motion to sever say yes.

8 Any opposed?

9 Motion carried.

10 So let us first discuss the jury view. On  
11 motion of either party, on its own initiative, or at  
12 the request of the jury, the court may order a jury  
13 view of a property or of a place where a material  
14 event occurred. The parties are entitled to be  
15 present at the jury view.

16 I don't believe we need further discussion on  
17 that, because it's already been discussed. So all  
18 those in favor of that language say yes.

19 All those opposed say no.

20 Any abstentions?

21 Motion carries, and for the record, that was  
22 a very strong yes vote, although not unanimous.

23 On the second part of the (J), during the  
24 view, no person, other than an officer designated by  
25 the court, may speak to the jury concerning the

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1 subject connected with the trial. Any such  
2 communication must be recorded in some fashion.

3 There has been a motion and a second to adopt  
4 that language. All those in favor of adopting this  
5 language say yes.

6 VOICE: You haven't had discussion.

7 CHAIRPERSON BUITEWEG: Well, we already had  
8 discussion. All right. I have been corrected by the  
9 parliamentarian. I need to call for a discussion on  
10 that. Is there any discussion on that? Okay.

11 All those in favor of adopting the rule as  
12 stated, the second half of it, say yes.

13 And all those opposed to adopting that  
14 segment of rule (J) say no.

15 Any abstentions?

16 That motion fails, and the Assembly is not  
17 adopting the second half of (J).

18 Next is (K), juror discussion.

19 MR. ROMBACH: Actually I am going to do (I).  
20 I am going to try to do it in the order in which it  
21 has been prescribed by the our interim rule here, so I  
22 am moving for adoption of 2.513(I), that having to do  
23 with jury questions.

24 The court may permit the jurors to ask  
25 questions of witnesses. If the court permits jurors

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1 to ask questions, it must employ a procedure that  
2 ensures that such questions are addressed to the  
3 witnesses by the court itself, that inappropriate  
4 questions are not asked, and that the parties have an  
5 opportunity outside the hearing of the jury to object  
6 to the questions. The court shall inform the jurors  
7 of the procedures to be followed for submitting  
8 questions to witnesses. I move for its adoption.

9 VOICE: Support.

10 CHAIRPERSON BUITEWEG: Any discussion on this  
11 motion?

12 MS. KLIDA: Dawn Kida, 18th judicial  
13 circuit. It is more a comment as to procedure on  
14 this. If this is something the Assembly is going to  
15 support, I have recently seen what can happen when the  
16 procedures are not carefully monitored I guess is the  
17 best way to say it. I have actually seen witnesses  
18 excused but for whatever reason remain in the  
19 courtroom after their testimony has been completed and  
20 then a jury question was brought into play and the  
21 witness had to take the stand again, and I actually  
22 saw two witnesses take the stand three different times  
23 for jury questions.

24 So I guess my concern is is that along with  
25 this rule there should be some very specific

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1 procedures so that you don't have that. I mean,  
2 that's, you know, that's a lot of stress on the  
3 witness, not to mention the attorneys themselves  
4 having to scurry and go back and forth for that. So  
5 that's my comment.

6 CHAIRPERSON BUITEWEG: Is there other  
7 discussion regarding questions from the jury?  
8 Judge Heath.

9 JUDGE HEATH: I share your concern. Our  
10 pattern, I think, addresses it. Did I read the  
11 pattern for asking questions to jurors before?

12 CHAIRPERSON BUITEWEG: The parliamentary  
13 says yes.

14 JUDGE HEATH: We tell them after the  
15 examination by attorneys, as it's concluded, that's  
16 the time for them to ask the questions. So I think  
17 that our jurors are made to know right upfront when  
18 the appropriate time for asking is. And I tell you  
19 what happens in practice is sometimes the judge  
20 forgets, you know. The witness is done, the attorneys  
21 are done, and you have been practicing law for umpteen  
22 years, you are not used to jurors asking questions,  
23 you are excused. Then all of a sudden some juror's  
24 hand will go up, oh, yeah, and then the judge is red  
25 faced, I am sorry, I forgot. Please.

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1 So that's as bad as it gets for me anyways  
2 when a juror is about halfway out of the chair. So we  
3 get them back in, the jurors ask the questions. And  
4 then one thing I forgot to mention to you that really  
5 happens too in practice is I make sure in my court,  
6 although this is not addressed in the pattern, that if  
7 the attorneys want follow-up questions after the juror  
8 questions, I permit that, and then I ask one more time  
9 of the jurors, Do you have any further questions?

10 So that's how the process, when you really  
11 get going and into it, really takes form.

12 CHAIRPERSON BUITEWEG: Judge Hammer.

13 JUDGE HAMMER: One quick observation. I  
14 think the concern of the speaker was very well placed.  
15 This rule seems just to empower us to do this. The  
16 procedures we follow are pretty much incorporated in  
17 the standard jury instruction we already have, which  
18 says at the end of the witness' testimony.

19 It seems like it would be very unusual to  
20 call a witness back from the courtroom. Again, that's  
21 always at the discretion of the judge. Taking  
22 witnesses out of order, I suppose witnesses could  
23 always be called back. If it was a compelling  
24 question, you could call a witness back just as you  
25 would an attorney thought of a question later on.

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1 But, again, that's just how the rule would be  
2 administered rather than the substance of the rule.

3 My experience is that it worked well, but I  
4 never had a juror come and say I would like to ask a  
5 question of somebody who testified yesterday or  
6 something like that. Then it's a question of fairness  
7 for the judge, which you are always able to do, even  
8 if an attorney thinks of a question later. It doesn't  
9 happen very often, and I can't envision a circumstance  
10 where I would allow it, but things like that could  
11 happen, but just because it could happen doesn't mean  
12 that this is a bad idea.

13 MR. CROSS: Cecil Cross, 6th circuit. I rise  
14 in opposition to this motion. Jury questions open the  
15 door for information that either the adversary did not  
16 bring up and maybe should have, opens the door for  
17 them to strengthen their case, and it also ignores the  
18 fact that the attorney, the opposition attorney who  
19 didn't want this question asked and didn't ask it him  
20 or herself now has the door opened for the jury to ask  
21 this question and have that information presented to  
22 them.

23 We have an adversary system. This does not  
24 increase the possibility of that adversary system for  
25 each attorney to fulfill their responsibility to

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1 present evidence. The jury is to decide the case on  
2 the evidence presented, not on the evidence that they  
3 would like to have had presented but on what is  
4 actually presented.

5 This ignores that procedure, and I ask you  
6 not to vote for this motion.

7 CHAIRPERSON BUITEWEG: Is there any other  
8 further discussion?

9 It has been moved and seconded that we have  
10 MCR 2.513(I) regarding jury questions. All those in  
11 favor of adopting this court rule please say yes.

12 All those opposed say no.

13 Any abstentions?

14 All right. I could not tell. I am sorry. I  
15 am going to have to have yeses please stand and  
16 tellers take a vote. I am very sorry. You were all  
17 good about not yelling, but I still couldn't tell.

18 (Vote being taken.)

19 You can sit down, and if you voted no, please  
20 stand up.

21 The motion carries 60 to 40. You may be  
22 seated. Thank you, tellers.

23 Mr. Rombach, now I would like you to take  
24 over.

25 MR. ROMBACH: I would next like to move for

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<p>1 consideration by the Assembly for 2.513(H), and that</p> <p>2 is on note taking. It's page nine in your pre-printed</p> <p>3 materials, and it's on page six of your yellow</p> <p>4 missalettes here.</p> <p>5 The court may permit the jurors to take notes</p> <p>6 regarding the evidence presented in court. If the</p> <p>7 court permits note taking, it must instruct the jurors</p> <p>8 that they need not take notes and that they should not</p> <p>9 permit note taking to interfere with their</p> <p>10 attentiveness. If the court allows jurors to take</p> <p>11 notes, jurors must be allowed to refer to their notes</p> <p>12 during deliberations, but the court must instruct the</p> <p>13 jurors to keep their notes confidential except to</p> <p>14 other jurors during deliberations. The court shall</p> <p>15 ensure that all juror notes are collected and</p> <p>16 destroyed when the trial is concluded. I move for its</p> <p>17 adoption.</p> <p>18 VOICE: Second.</p> <p>19 CHAIRPERSON BUIREWEG: Any discussion?</p> <p>20 VOICE: Call the question.</p> <p>21 CHAIRPERSON BUIREWEG: I have to take vote on</p> <p>22 calling the question. All those in favor of calling</p> <p>23 the question say yes.</p> <p>24 MS. KIRSCH-SATAWA: I couldn't get here fast</p> <p>25 enough. Lori.</p>	<p>1 friendly amendment. I am going to ask that if you</p> <p>2 want to change the court rule that you make a motion</p> <p>3 to change it so that I can tell, not have it be in</p> <p>4 Mr. Rombach's hands whether or not the language gets</p> <p>5 changed. If you want to make a motion, you can make a</p> <p>6 motion, but as the chair I am not going to have any</p> <p>7 more friendly amendments. It's just too difficult to</p> <p>8 deal with.</p> <p>9 So, Ms. Kirsch, would you like to make that</p> <p>10 motion?</p> <p>11 MS. KIRSCH-SATAWA: Sure. I would move that</p> <p>12 section (H) be amended in the last sentence to read,</p> <p>13 "The court shall ensure that all juror notes are</p> <p>14 collected and preserved for purposes of appeal when</p> <p>15 the trial is concluded," which in essence just strikes</p> <p>16 "destroyed" and adds that other phrase.</p> <p>17 CHAIRPERSON BUIREWEG: Okay. So do all of</p> <p>18 you have your yellow piece of paper in front of you,</p> <p>19 because you have got to get your pen out. You have to</p> <p>20 be scribes and you have to cross out the word</p> <p>21 "destroyed" and you have to insert "preserved for</p> <p>22 purposes of appeal." Could I have it quiet, please.</p> <p>23 MR. ANDREE: Point of order. You don't cross</p> <p>24 it out until the motion.</p> <p>25 CHAIRPERSON BUIREWEG: Just for your own</p>
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<p>1 CHAIRPERSON BUIREWEG: The question has been</p> <p>2 called, and the motion to call the question passed.</p> <p>3 All those opposed say no to calling the</p> <p>4 question.</p> <p>5 VOICE: No.</p> <p>6 CHAIRPERSON BUIREWEG: Okay. Well, now I</p> <p>7 can't tell. I am sorry. It had to be a two-thirds</p> <p>8 vote, you are right, so motion fails. Let's have the</p> <p>9 discussion.</p> <p>10 MS. KIRSCH-SATAWA: Thank you. Lisa</p> <p>11 Kirsch-Satawa, 6th circuit.</p> <p>12 VOICE: Can't hear you.</p> <p>13 MS. KIRSCH-SATAWA: Lisa Kirsch-Satawa, 6th</p> <p>14 circuit. I would make a friendly amendment to</p> <p>15 strike -- wait a minute -- the portion of the proposal</p> <p>16 that says that the notes will be destroyed. I would</p> <p>17 ask that that be amended to have language that they</p> <p>18 would be preserved for purposes of appeal.</p> <p>19 CHAIRPERSON BUIREWEG: Is there a second to</p> <p>20 the motion? Is there a second?</p> <p>21 VOICE: It was a friendly.</p> <p>22 CHAIRPERSON BUIREWEG: I know it was a</p> <p>23 friendly amendment. Judge Stephens and I had a</p> <p>24 conversation at lunch. According to our</p> <p>25 parliamentarian, there really is no such thing as a</p>	<p>1 edification. You don't have to cross it out.</p> <p>2 That is the motion. Is there a second to the</p> <p>3 motion?</p> <p>4 VOICE: Second.</p> <p>5 CHAIRPERSON BUIREWEG: Is there any</p> <p>6 discussion on the motion?</p> <p>7 All those in favor of the motion say yes.</p> <p>8 JUDGE KENT: I withdraw. No comment.</p> <p>9 CHAIRPERSON BUIREWEG: All those in favor of</p> <p>10 amending sub (H) as indicated say yes.</p> <p>11 All those opposed say no.</p> <p>12 Any abstentions?</p> <p>13 Okay. The motion fails.</p> <p>14 Now back to sub (H) without the amendment, so</p> <p>15 erase what you crossed out. Hopefully you were using</p> <p>16 a pencil.</p> <p>17 Is there any, is there any further</p> <p>18 discussion?</p> <p>19 All those in favor of adopting MCR 2.513(H)</p> <p>20 say yes.</p> <p>21 Any opposed.</p> <p>22 Abstentions?</p> <p>23 That passed unanimously. The last one in the</p> <p>24 cluster.</p> <p>25 MR. ROMBACH: I now move for adoption of</p>

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<p>1 2.513(K), juror discussion. After informing the 2 jurors that they are not to decide the case until they 3 have heard all the evidence, instructions of law, and 4 arguments of counsel, the court may instruct the 5 jurors that they are permitted to discuss the evidence 6 amongst themselves in the jury room during the trial 7 recesses. The jurors should be instructed that such 8 discussions may only take place when all jurors are 9 present and that such discussions may be clearly 10 understood as tentative pending final presentation of 11 all evidence, instructions, and argument. I move for 12 its adoption. 13 VOICE: Support. 14 MR. POULSON: Madam Chair, procedural 15 question. 16 CHAIRPERSON BUITEWEG: Yes, Mr. Poulson. 17 MR. POULSON: Barry Poulson, 1st. I think I 18 would like to move that we do this motion by doing it 19 in the following way, that we have the favorable 20 comments made and then we vote and then that will give 21 us a flavor of getting only half the case out in front 22 of us and making the decision, which is really what 23 this is. 24 (Applause.) 25 CHAIRPERSON BUITEWEG: The chair recognizes</p>	<p>1 All those opposed say no. 2 Any abstentions? 3 That was unanimously failed. 4 We are almost done, and at this point I think 5 Judge Heath needs to leave. Is there anything, Judge 6 Heath, that you would like to talk about the Interim 7 commentary or opening statements before you leave? 8 JUDGE HEATH: Now, this is Interim commentary 9 by the attorneys? 10 CHAIRPERSON BUITEWEG: That's correct. 11 JUDGE HEATH: As you know from previous 12 comments, I was pretty much opposed to a judge doing 13 that. I have less problems with the adversarial 14 process continuing it. To me it's almost like 15 argument, interim argument. 16 I think the adversarial process will take 17 care of problems that could arise with it. I realize 18 there will be other objections that people will 19 mention today, but I just want you to know I 20 personally have less problem with this one than I 21 would with the judge commenting. 22 And what's the last one? 23 CHAIRPERSON BUITEWEG: Opening statements, 24 which I don't think you have any. 25 JUDGE HEATH: We have opening statements.</p>
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<p>1 that as sarcasm. 2 MR. POULSON: Well, in that case it's 3 withdrawn. 4 CHAIRPERSON BUITEWEG: Any additional comment 5 or questions? 6 MR. BARTON: Bruce Barton, 4th circuit. I 7 had an experience of serving on a jury, and based on 8 that experience I am opposed to this motion. The 9 other jurors knew I was an attorney. That came out in 10 voir dire and couldn't be avoided. 11 I pretty much had my mind made up, without 12 expressing it, after the first witness. I am sure 13 that if we had discussed it in the jury room I would 14 have influenced the other jurors and probably the 15 following witnesses would not get as much credence. 16 The other thing about that I am opposed, but 17 I should also tell you something else about that 18 experience. It was a civil case, damage case. First 19 thing the jurors asked me when we started 20 deliberations was, How much money do we have to give 21 the plaintiff so the lawyer won't get it all? 22 CHAIRPERSON BUITEWEG: Is there any further 23 discussion? All right. 24 All those in favor of adopting MCR 2.513(K) 25 say yes.</p>	<p>1 CHAIRPERSON BUITEWEG: That you don't -- 2 there is no option to defer them? 3 JUDGE HEATH: There is -- yes, I believe 4 there is. My understanding is, but I have never had a 5 civil trial where opening statements were not made by 6 both sides. 7 CHAIRPERSON BUITEWEG: Are there other 8 panelists that would like to -- and let me just say, 9 Judge Heath, if you have to leave, please feel free, 10 and thank you. Could we just give a round of applause 11 to thank you, Judge. 12 (Applause.) 13 JUDGE HEATH: I am going to the University of 14 Notre Dame's campus to the University Club to have 15 dinner tonight with the sports information director, 16 so if there is anything you want me to pass along. I 17 will say, Go blue. 18 CHAIRPERSON BUITEWEG: My parliamentarian is 19 out of order. 20 Would any of the other panelists like to 21 comment on the cluster (D) interim commentary by 22 lawyers or opening statements? 23 JUDGE HAMMER: With respect to the opening 24 statements, I think it would be a good idea to give 25 jurors more information upfront instead of having them</p>

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<p>1 guess throughout the trial as to the burdens of proof 2 and some of the elements of the alleged crime. I have 3 no experience with it, obviously none of us do, but I 4 think that might be a good idea and might work, and I 5 would like to see at least it be given a try.</p> <p>6 As to the interim commentary, of course I am 7 a district judge. Sort of the nature of my trials are 8 relatively short. I really don't see the need for 9 them. I think they are sort of like an update when 10 you are watching a program to be continued later. You 11 have a long trial and the jury has to be updated as to 12 what they have already heard. I have got no 13 experience with it, none us do here in Michigan.</p> <p>14 I would tend to disagree with the judge from 15 Indiana. I think if one was given it should be given 16 by the judge, and that should be something prepared, 17 and counsel be given the opportunity to object, akin 18 to the opening instructions or the preliminary 19 instructions in a jury case where the judge summarizes 20 each side's arguments.</p> <p>21 I always try to avoid that. I would rather 22 not do it, but I do give a rather brief summary of 23 what each side's case is, with the attorneys' consent, 24 and see if they object to it, rather than have interim 25 arguments. Otherwise they are just arguing their case</p>	<p>1 MR. MIGLIO: I would agree with the two 2 judges. The interim commentary, the jury trial system 3 is presently set up to have an opening statement which 4 by law is supposed to be a full and fair accounting 5 with what the facts are. I really don't understand 6 what a judge might construe or opposing counsel might 7 construe as being his interim commentary, which 8 neither falls in the category of an opening statement 9 or closing argument, and I don't understand why or 10 under what circumstances it would be allowed at 11 appropriate junctures in the trial.</p> <p>12 There are plenty of times in longer cases 13 where the judge may give an opportunity for some 14 clarification that's agreed upon through a statement 15 by the judge that both parties have stipulated to, or 16 in some instances -- I mean, we have all tried cases. 17 There is more than enough commentary that goes on 18 between the two counsel during the course of the case 19 to make their case to the jury, and allowing this kind 20 of discretion for something that's called interim 21 commentary, which really has no connection to opening 22 and closing arguments, I think is a serious source of 23 danger for extending the trial and getting into 24 arguments and so forth.</p> <p>25 And aside from that, the first instruction</p>
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<p>1 one more time, and I think the only need would be in a 2 long trial where the jury sort of loses track of 3 where they are.</p> <p>4 Once again, I have got no experience with it. 5 I am a little skeptical. One of my observations 6 during the course of a number of these proposals are 7 perhaps we should have a set of rules that are options 8 in complex litigation and perhaps a long, complex 9 trial, something like that might be useful. I think 10 it would be good to have the judge do it with the 11 understanding that each party could have some input as 12 to what was said. That's just an observation.</p> <p>13 JUDGE KENT: The longest trial I ever had 14 with a jury, I think Judge Hammer was counsel for the 15 Attorney General on that case. I would not have 16 minded if he had made some comments during the 17 interim, but his opposing counsel probably would have 18 used it as the opportunity to become the 13th juror 19 once again or else the extra witness without 20 portfolio, and I am afraid that to hear from counsel 21 or the bench commenting on evidence during the midst 22 of the trial would unduly delay the trial and possibly 23 confuse, rather than enlighten, the jurors. I think 24 we would be far better to maintain our present 25 practice and to reject this proposal.</p>	<p>1 out of the judge's mouth usually is that whatever the 2 lawyers say isn't evidence anyway, so it's of no 3 consequence to pause to listen to what the interim 4 commentary is.</p> <p>5 MR. SHAPIRO: I have one very brief comment. 6 My only comment would be that the rule as drafted 7 doesn't really tell us what it is, and so it's 8 difficult to support it, even if in theory there might 9 be appropriate times or at least with stipulation of 10 the parties perhaps, but the rule does seem to be a 11 bit sparse for introducing a new concept.</p> <p>12 CHAIRPERSON BUITEWEG: Okay. Mr. Rombach, if 13 it's okay with you, I am going to appoint you as a 14 very temporary parliamentarian so our parliamentarian 15 can speak on this issue, unless there is any objection 16 by the Assembly. She asked to speak. Is there any 17 objection?</p> <p>18 JUDGE STEPHENS: Just very briefly. I have 19 actually had what might be described as interim 20 commentary in a case which lasted for two months. 21 About one month in half the case went away. At that 22 point permission was given for very brief opening 23 statement-like commentary on the case that was left 24 for the jurors to consider so they didn't have to 25 think about the other five counts that were gone.</p>



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<p>1 At this point when we do a bifurcated trial</p> <p>2 where issues of damages, liability and damages are</p> <p>3 separated or a case where it is a complex case and a</p> <p>4 portion or substantial portion of the case goes away</p> <p>5 at some point during the course of the trial, there is</p> <p>6 no explicit authority for the court to allow lawyers</p> <p>7 to address the jury. This is loosey goosey, I agree,</p> <p>8 but it does begin to speak to the issue of giving the</p> <p>9 court the discretion based upon the exposition of the</p> <p>10 case as it has been presented to the triers of fact to</p> <p>11 allow for some interim argument and/or opening</p> <p>12 statement.</p> <p>13 CHAIRPERSON BUIREWEG: Thank you. Is there</p> <p>14 any other further comment or discussion or questions?</p> <p>15 Let's have the motion.</p> <p>16 MR. ROMBACH: I am now moving for adoption of</p> <p>17 2.513(D) interim commentary. Each party may, in the</p> <p>18 court's discretion, present interim commentary at</p> <p>19 appropriate junctures of the trial. I move for its</p> <p>20 adoption, Madam Chair.</p> <p>21 CHAIRPERSON BUIREWEG: Is there second?</p> <p>22 VOICE: Support.</p> <p>23 CHAIRPERSON BUIREWEG: Any discussion?</p> <p>24 All those in favor of the motion say yes.</p> <p>25 All those opposed no.</p>	<p>1 members, you are dismissed, and thank you.</p> <p>2 (Applause.)</p> <p>3 CHAIRPERSON BUIREWEG: I am so worried about</p> <p>4 getting you all out of here by 4:00 as the agenda</p> <p>5 promises. I have got to slow down.</p> <p>6 The proponents of numbers 10, the emeritus</p> <p>7 attorney referral fee, and the Patient Compensation</p> <p>8 Act, which is 11, and numbers 13 and 14 have all very</p> <p>9 graciously agreed to defer those proposals to our next</p> <p>10 meeting, and it will be up to your next chairperson</p> <p>11 whether he chooses to request a special meeting to</p> <p>12 deal with the matters that we didn't have time for</p> <p>13 today.</p> <p>14 I am going, because I think it will be</p> <p>15 extremely brief to take the very last action item that</p> <p>16 we have on the agenda, and then we are going to elect</p> <p>17 the clerk and pass the gavel, and we will get out of</p> <p>18 here as close to 4 as we can.</p> <p>19 Does anybody object to deferring those action</p> <p>20 items that I just brought forth? Okay.</p> <p>21 So, Ms. Stangl, if we could have you come up</p> <p>22 and handle number 12, consideration of the proposed</p> <p>23 amendments to SCAO forms MC-13 and MC-14, and I would</p> <p>24 like you to please look for the green sheets at your</p> <p>25 desk. They are slightly different than the ones in</p>
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<p>1 Any abstentions?</p> <p>2 The motion fails substantially.</p> <p>3 Next and last.</p> <p>4 MR. ROMBACH: Finally, Madam Chair, I move</p> <p>5 for adoption of Rule 2.513(C), opening statements.</p> <p>6 Unless the parties and the court agree otherwise, the</p> <p>7 plaintiff or the prosecutor, before presenting</p> <p>8 evidence, must make a full and fair statement of the</p> <p>9 case and the facts the plaintiff or the prosecutor</p> <p>10 intends to prove. Immediately thereafter or</p> <p>11 immediately before presenting evidence the defendant</p> <p>12 may make a similar statement. The court may impose</p> <p>13 reasonable time limits on the opening statements.</p> <p>14 Move for its adoption.</p> <p>15 CHAIRPERSON BUIREWEG: Is there a second?</p> <p>16 VOICE: Second.</p> <p>17 CHAIRPERSON BUIREWEG: Any discussion?</p> <p>18 All those in favor of 2.513(C) say yes.</p> <p>19 All those opposed say no.</p> <p>20 Any abstentions?</p> <p>21 Motion carries.</p> <p>22 Okay. That completes our jury reform section</p> <p>23 of the agenda. We have been asked by the proponents</p> <p>24 or obtained agreement of the proponents of numbers</p> <p>25 11 — I am sorry, 10 — oh, I am sorry. Okay. Panel</p>	<p>1 your packet. Those are the ones we will be voting</p> <p>2 upon. Ms. Stangl.</p> <p>3 MS. STANGL: Thank you, Madam Chair, Terri</p> <p>4 Stangl from the 10th circuit. This pertains to what</p> <p>5 is the green item in your packet. It is a proposed</p> <p>6 change in MC-13 and 14, which are the garnishment</p> <p>7 forms used by the SCAO. This is prompted by the fact</p> <p>8 that under federal law there are certain kinds of</p> <p>9 federal benefits, particularly Social Security and</p> <p>10 SSI, which are exempt from garnishment.</p> <p>11 Under the current practice, when a creditor</p> <p>12 serves the garnishment form on the bank, they may note</p> <p>13 if there is funds there and they are held pending a</p> <p>14 determination of what kind of funds are there. What</p> <p>15 this rule would require of the financial institution</p> <p>16 to do is check off if the sole deposits are one of</p> <p>17 those exempt federal funds. That would allow a person</p> <p>18 who lives only on that money in many cases to be able</p> <p>19 to use the money to pay their bills. This would not</p> <p>20 apply in any instance where the funds were comingled,</p> <p>21 and banks generally have these federal deposits, which</p> <p>22 have to be deposited in the bank, coded so they can</p> <p>23 tell at a glance what's the source of those funds.</p> <p>24 So this would streamline the process for the</p> <p>25 bank, it would make it clear upfront to the creditor,</p>